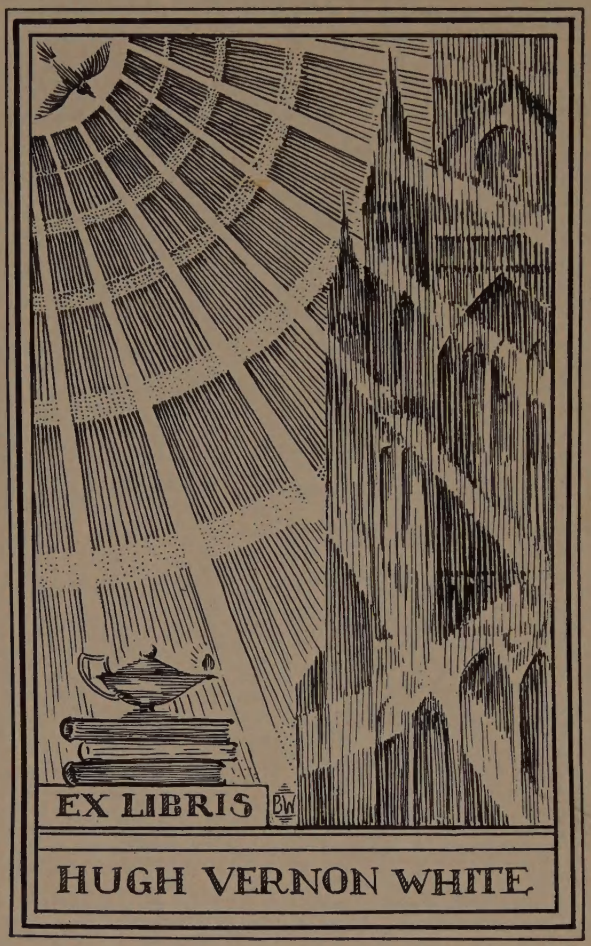
MARRIAGE AND DIVORCE

JAMES BRYCE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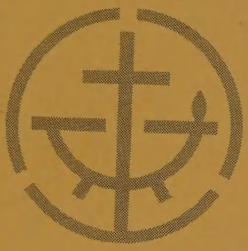

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BY

JAMES BRYCE, D.C.L.

AUTHOR OF
"THE HOLY ROMAN EMPIRE," "THE AMERICAN COMMONWEALTH," ETC.
FORMERLY REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY
OF OXFORD; HONORARY FELLOW OF ORIEL AND TRINITY
COLLEGES, CORRESPONDING MEMBER OF THE
INSTITUTE OF FRANCE

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PREFACE

Of all legal institutions, Marriage is that which most profoundly affects the structure and character of society. The State, it is often said, depends upon the Family; and the Family is constituted by Marriage. Every educated man must desire to have some knowledge of the history of such an institution. But the books which present legal rules to the ordinary reader in an untechnical way are few; and perhaps even fewer are those which endeavour to connect the ancient with the modern history of any legal institution. I have tried in an essay which formed part of my *Studies in History and Jurisprudence* (published in 1901) to handle the history of marriage in such a way as to make it intelligible to a non-legal reader; and as I am told that many American readers who are not greatly interested in the other topics discussed in that book desire to be informed upon this subject, I have willingly assented to the separate publication of that Essay. It is only of civilized European marriage that the Essay treats, sketching its development from the date of the earliest Roman legislation known to us down to our own time. Primitive marriage, as recorded by ancient traditions, or witnessed to by ancient customs, or as it exists among uncivilized races to-day, is a subject of great interest, which may be studied in the works of the late J. F. MacLennan, and the late W. Robertson Smith, as well as in those of Professor Westermarck, and other learned writers. But I do not touch it here, nor have I attempted to set forth either the legal formalities prescribed by modern English and American law for contracting a marriage, or the legal incidents of the marriage relation. These are matters which belong to a law book in the proper sense.

What I have sought to give is a historical view of the subject, and a general view, compressed and concise, because the subject is a large one, yet sufficient to shew the salient features of the long and curious course of development through which the institution has passed. And in

the concluding pages I have dwelt especially upon the recent tendency, observable in Europe as well as in America, to make the marriage tie more easily dissoluble, comparing it with the similar tendency conspicuous in the later days of Rome. The problems raised by the divorce legislation of our own time are among the gravest which society has now to face; and they deserve more consideration than they have yet received. Different as were the conditions of life, and especially of religious life, in the Roman Empire, the experience of Rome may not be without some warning for our own time.

JAMES BRYCE.

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XVI

MARRIAGE AND DIVORCE UNDER ROMAN AND ENGLISH LAW

I. Introductory.

In all communities that have risen out of the savage state, no legal institution is at once so universal, and also so fundamental, a part of their social system as is Marriage. None affects the inner life of a nation so profoundly, or in so many ways, ethical, social, and economic. None has appeared under more various forms, or been more often modified by law, when sentiment or religion prescribed a change. In a famous passage which has been constantly quoted, and often misunderstood, Ulpian takes marriage as the type of those legal relations which are prescribed by the Law of Nature, and extends that Law so far as to make it govern the irrational creatures as well as mankind[1]. If then the relation be so eminently natural, one might expect it to be also uniform. Yet it so happens that there is no relation with which custom and legislation have, in different peoples and at different times, dealt so differently. Nature must surely have spoken with a very uncertain voice when, as the jurist says, she 'taught this law to all animals.' Nor does this infinite diversity show signs of disappearing. While in most branches of law the progress of parallel development in various civilized states is a progress towards uniformity, so that

[1] See Essay XI, p. 587.

the commercial law, for instance, of the chief European countries and of the United States is, as respects nineteen-twentieths of its substance, practically identical, the laws of these same countries are, in what relates to the forms of contracting marriage, the effect of marriage upon property rights, the grounds for dissolving and modes of dissolving marriage, extremely different, and apparently likely to remain different. Even within the narrow limits of the United Kingdom, England and Scotland have each its own system. Ireland has a different law from England in respect of the mode of solemnization; while, as respects divorce, the divergence goes so far that grounds are recognized as sufficient for divorce in Scotland which are not admitted in England, while in Ireland a divorce, except by private Act of Parliament, cannot be obtained at all. And the efforts to assimilate these three diverse systems made by reformers during two or three generations have been followed by so little practical result that they have been of late years altogether dropped.

Out of the long and obscure and intricate history of the subject, and out of the many still unsolved problems it presents, I propose to select one subject for discussion, viz. the history of the Roman law of the marriage relation, as compared with the English law, and particularly with some of the later developments of English law in the United States. On the antiquities of the matter, and in particular on the interesting and difficult questions relating to primitive forms of marriage, and to the polyandry which is supposed to have marked the earlier life of many peoples, I shall not attempt to touch. Neither can I do more than glance at the ecclesiastical history of the institution, important as the church has been in influencing civil enactments and moulding social sentiment.

To elucidate the Roman system, some few technical details must be given, but I shall confine myself to those which are needed in order to facilitate a compari-

son between it and that of England, and to show how essentially the later Roman conception of the relation differed from that which Christianity created in mediaeval Europe.

II. Character of Marriage in Early Law.

When clear light first breaks upon the ancient world round the Mediterranean Sea we find that the relation of the sexes exists in three forms. The most savage tribes, such as those which Herodotus saw or heard of in Libya and Scythia, have no regular marriage at all. Some lived in a kind of promiscuity; some were probably polyandrous. The Eastern peoples—Persians, Lydians, Babylonians, and so forth—are polygamous, as was Israel in the days of Moses and Solomon, though in a much lesser degree after the Captivity, and as was the Trojan Priam of the Homeric poems. The Western peoples, and especially the Greeks and the Italians, were, broadly speaking, monogamous, although concubinage superadded to lawful marriage, especially among the Greeks, was not unknown. The contrast of the East and the West was marked; and this particular difference was not only characteristic but momentous, since it presaged a different course for the social development of the two regions [1]. So when the Teutonic and Celtic peoples came later on the stage, they too were generally monogamous, though among the heathen Celts the tie seems to have been somewhat looser than among the Teutons, and a plurality of wives may have been not uncommon in heathen times. Tacitus, while dwelling on the sanctity of German marriages, observes that occasionally the chieftains had more than one wife, owing to the wish of other families for alliance with them [2]. Polygamy slowly died out of the East under Roman rule, though possibly never quite extinguished,

[1] Euripides (*Androm.* vv. 173-180) contrasts the marriage usages of barbarians and Greeks, and dilates (cf. v. 465 sqq.) on the evils of polygamy.

[2] Tac. *Germ.* c. xvii.

for we find prohibitions of it renewed by the Emperors down to Diocletian, before whose time all subjects had become citizens. It maintained itself in the Oriental court of the Sassanid kings of Persia, and was indeed one of the features of Persian life which most shocked the philosophers of the later Roman Empire. As there is no trace of it in the Roman law [1], it need not concern us further, since it has never, except in the singular instance of the Mormons, reappeared in any of the communities which have been regulated either by Roman or by Teutonic law [2].

Before describing the Roman system, let us note three general features which belong to the marriage customs, not indeed of all, but certainly of most peoples in the earlier stages of civilization. They are worth noting, because they constitute the central threads of the history of the relation during civilized times.

(1) The marriage tie has more or less of a religious or sacred character, being generally entered into with rites or ceremonies which place it under supernatural sanctions. This is, of course, more distinctly the case where monogamy prevails.

(2) In the marriage relation the husband has a predominant position both as regards control over the person and conduct of the wife, and as regards property, whether that which was hers or that which was brought into common stock by her and by him.

(3) The tie is comparatively easy of dissolution by the husband, less easily dissoluble by the wife. This is a natural consequence of the inferior position which she holds in early society.

Although these three features are generally characteristic of the earlier stages of family law, they are not universally present; and their presence or absence in

[1] Although Julius Caesar, if we may credit Suetonius, caused a measure to be drafted for enabling him to marry as many wives as he liked for the sake of having legitimate issue (Suet. *Julius*, c. 52).

[2] Among the Jews it was (though forbidden by Roman law) not formally abolished till the tenth century.

any given community does not necessarily coincide with a lower or higher scale of civilization in that community. The temptation to generalize in these matters is natural, but it is dangerous. True as may seem the general proposition, that the higher or lower position of women in any society is a pretty good index to the progress that society has made, there are too many exceptions to the rule for us to take it as a point of departure for inquiry. Nor can these exceptions be always accounted for by any one cause, such as race or religion.

III. The Earlier Form of Roman Marriage Law.

Now let us come to the Romans, of whom we may say that it is they who have built up the marriage law of the civilized world, partly by their action as secular rulers in pagan times, partly by their action as priests in Christian times. The other modifying elements, and particularly the Hebrew and Teutonic influences, which have worked upon the marriage laws of Christendom, are of quite inferior moment.

Roman law begins with two phenomena which seem at first sight inconsistent. One is the complete subjection of the wife to the husband on the legal side, as regards both person and property. The other is her complete equality on the social and moral side, as regards her status and the respect paid to her.

In describing the nature of this subjection, one must make it clearly understood that, strictly speaking, it was not by the mere fact of marriage, that is to say, by the legal act necessary to constitute marriage, that a woman entered that position of absolute absorption into the legal personality of her husband which is so remarkable a feature of the old law. Whatever may have been the case in prehistoric times, we find that at the time when the Twelve Tables were enacted (B.C. 449) a marriage could be contracted without any forms or ceremonies whatever, by the sole consent of the parties; and that,

where this was the case, the husband did not acquire any power over the wife, and the latter retained whatever property she previously possessed. It was therefore not marriage *per se* that created the power of the husband, for a woman might be legally married and not be under the marital power. But although this 'free marriage,' as we may call it (the term is not Roman, but invented by modern jurists), was legally possible, the custom, and in old days the almost invariable custom, of the people was to add to the marriage a ceremony not essential to its validity as a marriage, but one which had important legal consequences. We may safely assume that there was originally no true marriage without the ceremony, but at the time of the Twelve Tables this was no longer the case. The ceremony created a relation which the Romans called Hand (*manus*), and brought the wife into her husband's power, putting her, so far as legal rights went, in the position of a daughter (*filiae loco*). It gave the husband all the property she had when she married. It entitled him to all she might acquire afterwards, whether by gift or by her own labour. It enabled him to command her labour, and even to sell her, though the sale neither extinguished the marriage nor made her a slave, but merely enabled the purchaser to make her work, while still requiring him to respect her personal rights [1]. In compensation for these disadvantages the wife became entitled to be supported by her husband, and to receive a share of his property at his death, as one of the 'family heirs' (*sui heredes*), whom he could disinherit only in a formal way. She had by coming under his Hand passed out of her original family, and lost all right by the strict civil law to share in the inheritance of her father.

There were two forms of ceremony by which this power of the Hand could be created. One, probably

[1] Some writers doubt whether this power of sale existed, and refer to a supposed 'law of Romulus' mentioned by Plutarch which devoted to the infernal gods whoever sold his wife. But the balance seems to incline in favour of the existence of the power.

the older, had a religious character. It took place in the presence of the chief pontiff, and its main feature was a sacrifice to Jupiter, with the eating by the bride and bridegroom of a cake of a particular kind of corn (*far*), whence it was called *confarreatio*. It was originally confined to members of the patrician houses. The other was a purely civil act, and consisted in the sale by the bride of herself, with the approval of her father or her guardian (as the case might be), to the bridegroom, apparently accompanied (though there is a controversy on this point) by a contemporaneous sale by the bridegroom of himself to the bride. The transaction was carried out with certain formal words and in the presence of five witnesses (being citizens)[1], besides the man who held the scales with which the money constituting the price was supposed to be weighed. The price was of course nominal, though it had in very early times been real.

These two forms have been frequently spoken of as if they were indispensable forms of marriage, so that marriage had always the Hand power as its consequence. But this, though it may probably have been the case in very early days, was not so in those historical times to which I must confine myself. And the proof of this may be found in the fact that if a woman was married without either of the above forms, she did not pass into the Hand of her husband unless or until she had lived with him for a year, and not even then if she had absented herself from his house for three continuous nights during that year[2]. And where the Hand power had not been created, the property rights of the wife, whatever they were[3], remained unaffected by the marriage.

[1] There has been much dispute as to this ceremony: I give what seems the most probable view. It may descend from a more ancient sale of the wife by her relatives to the husband, similar to that which we find in some primitive peoples.

[2] This was in pursuance of the general rule that rights over a movable were acquired by a year's continuous holding: 'usus auctoritas fundi biennium, caeterarum rerum annuus esto.'

[3] If she was in the power (*potestas*) of her father, she had no property of her own. If she was *sui iuris*, she was under guardianship.

The period of three nights is fixed in the Twelve Tables, possibly as a precise definition of a custom previously more uncertain.

This was the old Roman system, and a very singular system it was, because it placed side by side the extreme of marital control as the normal state of things and the complete absence of that control as a possible state of things. Doubtless the marriages with Hand were in early days practically universal, resting upon a sentiment and a social usage so strong that women themselves did not desire the free marriage, which would put them in an exceptional position, outside the legal family of the husband. Nor can we doubt that the wide power which the law gave to the husband was in point of fact restrained within narrow limits, not only by affection, but also by the vigilant public opinion of a comparatively small community.

IV. Change from the Earlier to the Later System at Rome.

Before the close of the republican period the rite of *confarreatio* practically died out, or was referred to as an old-world curiosity, much as a modern English lawyer might refer to the power of excommunication possessed by ecclesiastical authorities. The patrician houses had become comparatively few, and the daughters of those that remained evidently did not wish to come under the Hand power[1]. The form of *coemptio*, which all citizens might use, lasted longer, and seems to have been not infrequently applied in Cicero's time. Two centuries later it also was vanishing, and Gaius tells us that the rule under which uninterrupted residence created the husband's power of Hand, and might be stopped by

[1] Nevertheless it was retained in a few families for the purpose of providing persons who could hold four great priestly offices, since by ancient usage none save those born from a marriage with confarreation were able to serve these priesthoods. But its operation seems to have been restricted by a decree of the senate so as to apply only so far as religious rites were concerned (*quoad sacra*) (Gai *Inst.* i. 136).

the wife's three nights' absence, had completely disappeared (Gai *Inst.* i. 111). So we may say broadly that from the time of Julius Caesar onwards the marriage without Hand had become the rule, while from the time of Hadrian onwards the legal acts that had usually accompanied marriage, which placed the wife under the husband's control, were almost obsolete.

This was a remarkable change. The Roman wife in the time of the Punic Wars had, with rare exceptions, been absolutely subject to her husband. She passed out of her original family, losing her rights of inheritance in it. Her husband acquired all her property. He could control her actions. He sat as judge over her, if she was accused of any offence, although custom required that a sort of council of his and her relatives should be summoned to advise him and to see fair play. He could put her to death if found guilty. He could (apparently) sell her into a condition practically equivalent to slavery, and could surrender her to a plaintiff who sued him in respect of any civil wrong she had committed, thereby ridding himself of liability. One can hardly imagine a more absolute subjection to one person of another person who was nevertheless not only free but respected and influential, as we know that the wife in old Rome was. It would be difficult to understand how such a system worked did we not know that manners and public opinion restrain the exercise of legal rights.

Such was the old practice. Under the new one, universal in the time of Domitian and Trajan, which is also the time of Tacitus, Juvenal and Martial, the Roman wife was absolutely independent of her husband, just as if she had remained unmarried. He had little or no legal power of constraint over her actions. Her property, that which came to her by gift or bequest as well as that which she earned, remained her own to all intents and for all purposes. She did not enter her husband's family, and acquired only a very limited right of intestate succession to his property.

This striking contrast may be explained by the fact that the disabilities which attached to the wife under the old system were not in legal strictness the consequence of marriage itself, but of legal acts which an almost universal sentiment and custom had attached to marriage, though in themselves acts distinct from it. A perfectly valid marriage could exist without these legal acts, and so far back as our authorities carry us, we find that a few, though probably originally only a very few, marriages did take place without them. Accordingly when sentiment changed, and custom no longer prescribed the use of confarreation or coemption, the power of Hand vanished of itself and vanished utterly. Had it been an essential part of the marriage ceremony, it would doubtless have been by degrees weakened in force and accommodated to the ideas of a new society. But no legislation was needed to emancipate the wife. The mere omission to apply one or other of the old concomitants gave the marriage relation all the freedom the parties could desire and perhaps more than was expedient for them.

We may now dismiss these ancient forms and address ourselves to the position of the wife under the normal marriage of later times—the so-called 'free marriage,' since this is the form in which the Roman institution descended to and has affected modern law [1].

V. Later Marriage Law: Personal Relation of the Consorts.

The following points deserve to be noted as characterizing the Roman view.

The act whereby marriage was contracted was a

[1] I pass by the distinction between *iustae nuptiae*, which could be contracted only between Roman citizens, and the so-called 'natural' marriage, or *matrimonium iuris gentium*, which was created by the marriage of a full citizen to a half citizen or an alien (*peregrinus*), because the latter is of no consequence for our purpose, and practically disappeared when all Roman subjects became citizens. It was a perfectly valid marriage, and the children were legitimate. As to their status, see Gai *Inst.* i. 78, 79.

purely private act. No intervention of any State official, no registration or other public record of any sort was required. The two parties, and the two parties only, were deemed to be concerned [1].

The act was a purely civil act, to which no religious or ecclesiastical rite was essential either in heathen or in Christian times. There were indeed what may be called decorative ceremonies, some of which we find mentioned in poems like the famous Epithalamium of Catullus, but they had no more to do with the legal nature and effect of the matter than has the throwing of old shoes or rice at a modern English wedding.

The act required no prescribed form. It consisted solely in the reciprocally expressed consent of the parties, which might be given in any words, or be subsequently presumed from facts. 'Marriage is contracted by consent only' (*nuptiae solo consensu contrahuntur*) is the invariable Roman maxim. Even the conducting of the bride to the bridegroom's house, which has sometimes been represented as necessary [2], seems to have been regarded rather as evidence needed in certain cases than as essential to the validity of the act [3]. A generally prevalent usage made a formal betrothal (*sponsalia*) precede the actual wedding. But the betrothal promise created no legal right. No action lay upon it, such as that which English and Anglo-American law unfortunately allows to be brought for breach

[1] Where either party was subject to the paternal power of his or her father (or grandfather), the consent of the father (or grandfather) (or both) was required, though in a few specified cases it might be either dispensed with or compelled. This was a consequence of the Roman family system. It was irrespective of the age of bride or bridegroom.

[2] The Emperor Majorian (A.D. 455-461) is said to have issued a constitution for the Western Empire, making the creation of a *dos* essential to the validity of a marriage; but this provision, which can hardly have been intended to be general, seems to have never taken effect. The Western Empire was then in the throes of dissolution.

[3] See Paul., *Sent. Recept.* xix. 8; *Dig.* xxii. 2. 5. The suggestion which may be found in some modern writers that Marriage fell within the class of the contracts created by the delivery of an object (the so-called Real Contracts), has no Roman authority in its favour, and is indeed based on a misconception of the nature of those four contracts, in all of which the obligation created is for the restoring of the object delivered. Marriage is assuredly not a bailment.

of promise of marriage. In early times formal and binding stipulations seem to have been often made on each side between the bridegroom and the father (or other male relative) of the bride for the giving and receiving of the bride; and if the promise were broken without sufficient cause, an action lay against the party in fault for the worth of the marriage [1]. This, however, disappeared. Under the influence of a more refined sentiment, not only could no promise of marriage be enforced, but if the parties made a contract whereby each bound him or herself to the other in a penal sum to become payable in case of breach, such a provision was held to be disgraceful (*pactum turpe*) as well as invalid. This was the law of later republican and imperial times. Betrothal had, however, some legal effects. It entitled either of the betrothed parties to bring an action for an injury (of an insulting nature) offered to the other. It rendered any one infamous who being betrothed to one person contracted betrothal to another. It entitled either party, if the espousal was broken off before marriage, to reclaim whatever gifts he or she might have bestowed upon the other.

As regards personal status, the wife acquired that of her husband (unless either had been formerly a slave), and his domicil became hers. In the old days of Hand power she had taken the name of his *gens*, but now she retained her own, besides her personal 'first name' (*praenomen*) (*e.g.* Tertia) [2]. Each spouse being interested in the character and reputation of the other, he could sue for damages if any insult was offered to her, she for insult to him. He is bound to support her in a manner suitable to their rank, whatever her private means may be. Though each can bring an action against

[1] This was at any rate a usage among the Latins; but how far in Rome seems doubtful.

[2] Under the Empire we usually find women using two names, from their father's *gens* and family (e.g. *Caecilia Metella*). Sometimes, it would seem, the name of the father's *gens* was followed by one taken from the mother (e.g. *Iunia Lepida*, *Annaea Faustina*). The subject is fully discussed by Mommsen, in his *Römisches Staatsrecht*.

the other, the action must not be one which affects personal credit and honour (*actio infamans*), and hence, though each has his and her own property, neither can proceed against the other by a civil action of theft, even if the property seized was seized in contemplation of a divorce [1]. It need hardly be added that if the wife's father, or grandfather, were living, she would remain, unless she had been emancipated, subject to the paternal power, being for all legal purposes a member of her original family and not of her husband's. But the person in whose power she is cannot (at least in imperial days) take her away from her husband. Antoninus Pius forbade a happy marriage to be disturbed by a father; and in the third century (perhaps earlier) the husband could proceed by way of interdict to compel a father to restore his wife to him [2].

VI. Later Law. Pecuniary Relations of the Consorts.

This curiously detached position of the two consorts expressed itself in their pecuniary relations. Each had complete disposal of his or her property by will as well as during life, though the wife needed, down to a comparatively late time, the authority of her guardian [3]. Neither had originally any right of succession to the other in case of intestacy, nor had the wife any right of intestate succession to her children nor they to her, except that which the Praetor gave them among the blood relatives (*cognati*) generally, after the agnates (persons related through males). A state of things so inconsistent with natural feeling could not however always continue,

[1] A special action (*rerum amotarum*) was given in this case. Some jurists held that the joint enjoyment of household goods made the conception of Theft inapplicable to a wife's dealings, however unauthorized, with her husband's property. *Dig.* xxv. 2. 1.

[2] *Dig.* xliii. 30. 2.

[3] The guardianship of women of full age seems to have died out after women received power to select a guardian for themselves, a change which of course made his action purely formal.

so the Praetor created a rule of practice whereby each consort had a reciprocal right of succession to the other. But even in doing so, he placed this succession after that of other blood relations, as far as the children of second cousins. This postponement of a consort to blood relatives was carried even further by Justinian's legislation, for that emperor extended the category of relatives who could succeed in case of intestacy, and made no provision for the wife (beyond that which the Praetor had made), except to some small degree in case of a necessitous widow. The relationship of mother and child received a somewhat fuller recognition, for laws (*Senatus Consultum Tertullianum*, *Sc. Orphitianum*) of the time of Hadrian and Marcus Aurelius gave the mother and the children reciprocal rights of inheritance [1], which, finding a place in the general scheme of succession based on consanguinity which Justinian established, have passed into modern law.

Distinct as were the personalities of the two consorts in respect of property, the practical needs of a joint life recommended some plan under which a provision might be made for the expenses of a joint household. This sprang up as soon as marriages without the concomitant creation of the Hand power had grown common. It became usual for the wife to bring with her land or goods, either her own, if she were independent, or bestowed by her father or other relative. This property, which was destined for the support of the married pair and their children, was called the *Dos*, a term which, since it denotes the wife's contribution to the matrimonial fund, must not be translated by our English word Dower, for that term describes the right of a wife who survives her husband to have a share in his landed estate. Many rules sprang up regarding the *Dos*, rules probably due in the first instance to custom, for as the instruments of marriage contracts were usually drawn

[1] The mother's succession was originally granted only where she had borne three children (if a freed-woman, four).

on pretty uniform lines, these lines ultimately became settled law[1]. The general principle came to be that property given from the wife's side, whether by her father, or by herself, or by some of her relatives, became subject to the husband's right of user while the marriage lasted, as enabling him to fulfil his obligation to support wife and children, but at the expiry of the marriage by the death (natural or civil) of either party, or by divorce, reverted to the wife or her heirs[2]. If, however, the property had been given by the wife's father, he might, if still living, reclaim it[3]. The *Dos* is said by the Romans to be given for the purpose of supporting the burden of married housekeeping, and therefore the administration and usufruct of it pertain to the husband, while the ultimate ownership remains in the wife, or in the father who constituted it, as the case may be. In the later imperial period a sort of second form of matrimonial property was introduced, called the gift for the sake of marriage (*donatio propter nuptias*). It was made by the husband, and remained his property both during and after the marriage. So far, as it was only theoretically separated from other parts of the husband's estate, it might seem to have no importance. But if he became insolvent, it did not, like the rest of his property, pass to his creditors, but went over to the wife, just as the *Dos*, although administered by the husband, remained unaffected by his insolvency. And just as the husband was entitled, where a divorce was caused by the wife's fault, to retain a part of the *Dos*, so if a divorce was caused by the husband's fault, the *donatio propter nuptias*, or a part of it, might be claimed by the

[1] The 'custom of conveyancers' has worked itself into English law in a somewhat similar way.

[2] This was the rule as settled by Justinian. Before his time, the husband took the *Dos* at the wife's death unless it had been given by her father.

[3] There are many less important rules regarding the extent of the husband's interest and the form in which the property is to be restored at the end of the marriage, which it is not necessary to set forth, as they do not affect the general principle. Indeed generally through these pages I am forced, for the sake of clearness and brevity, to omit a number of minor provisions.

injured wife. The similarity of some of these arrangements to the practice of English marriage settlements will occur to every one's mind, though in England settlements are always created and governed by the provisions of the deeds which create them, whereas in Rome, although special provisions were frequently resorted to, there arose a general legal doctrine whose provisions were applicable to gifts made upon or in contemplation of marriage.

One further point needs to be mentioned. It was a very old customary (or, as we should say, common law) rule of Roman law that neither of the wedded pair could during the marriage bestow gifts upon the other, the reason assigned being the risk that one or other might by the exercise of the influence arising from their relation be deprived of his or her property to his or her permanent damage (*ne mutuato amore invicem spoliarentur*). This principle, which protects the wife from being either wheedled or bullied out of her separate property, and may be compared with the English restraint on alienation or anticipation applied to a wife's settled property, was also held to be occasionally needed to protect the husband's interests, and those of the children, from suffering at the hands of a grasping wife. It issues from the view which the Roman jurists enounce that affection must not be abused so as to obtain pecuniary gain; and one jurist adds that if either party were permitted to make gifts the omission to make them might lead to the dissolution of the marriage, and so the continuance of marriages would be purchasable [1]. Such gifts were accordingly held null and void, the only exception being that where property actually given had been left in the donee's hands until the donor's death, the heir of the donor could not reclaim it from the sur-

[1] 'Sextus Caecilius et illam causam adiciebat, quia saepe futurum esset ut discuterentur matrimonia si non donaret is qui posset atque ea ratione eventurum ut venalicia essent matrimonia.' This view was sanctioned by the Emperor Caracalla in his speech to the senate, which introduced the exception next mentioned in the text; *Dig.* xxiv. 1. 2.

viving donee. Needless to say that the rule only covered serious transfers of property, and did not apply to gifts of dress or ornaments or such other tokens of affection as may from time to time pass between happy consorts.

VII. General Character of the Roman Conception of Marriage.

Reviewing the rules which regulated marriage without the Hand Power, the sole marriage of the classical times of Roman law, we are struck by three things.

The conception of the marriage relation is an altogether high and worthy one. A great jurist defines it as a partnership in the whole of life, a sharing of rights both sacred and secular[1]. The wife is the husband's equal[2]. She has full control of her daily life and her property. She is not shut up, like the Greek wife, especially among the Ionians, in a sort of Oriental seclusion, but moves freely about the city, not only mistress of her home, but also claiming and receiving public respect, though so far placed on a different footing from men, and judged by a standard more rigid than ours, that it was deemed unbecoming for her to dance and shocking for her to drink wine.

The marriage relation is deemed to be wholly a matter of private concern with which neither the State nor (in Christian times) the Church has to concern itself. This was so far modified under the Emperors, that the State, from the time of Augustus, began to try to discourage celibacy and childlessness in the interests of the maintenance of an upper class Roman population, as opposed to one recruited from freed men and strangers. But these efforts were not, as we shall see, incompatible with adherence to the general principle that the formation and dissolution of the tie required no State inter-

[1] 'Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio;' Modestinus in *Dig.* xxiii. 2. 1.

[2] This was expressed in the phrase which the bride anciently used when brought to the husband's house: 'Ubi tu Gaius, ego Gaia.'

vention, nor even any form prescribed by State authority.

The marriage relation rests entirely on the free will of the two parties [1]. If either having promised to enter it refuses to do so, no liability is incurred. If either desires to quit it, he or she can do so. Within it, each retains his or her absolute freedom of action, absolute disposal of his or her property.

Compulsion in any form or guise is utterly opposed to a connexion which springs from free choice and is sustained by affection only.

These principles have a special interest as being the latest word of ancient civilization before Christianity began to influence legislation. They have in them much that is elevated, much that is attractive. They embody the doctrines which, after an interval of many centuries, have again begun to be preached with the fervour of conviction to the modern world, especially in England and the United States, by many zealous friends of progress, and especially by those who think that the greatest step towards progress is to be found in what is called the emancipation of woman.

VIII. Divorce in Roman Law.

Let us now see how the Roman principles aforesaid worked out in practice as regards domestic morality and the structure of society, that structure depending for its health and its strength upon the purity of home life at least as much as it does upon any other factor.

The last of the above-stated three principles is the derivation of all the attributes of the marriage relation from the uncontrolled free will of the parties. This principle is applied to the continuance of the relation itself. With us moderns the tie is a permanent tie, which, though freely formed, cannot be freely dissolved,

[1] 'Libera matrimonia esse antiquitus placuit,' says the Emperor Severus Alexander in the third century. *Cod.* viii. 38. 2.

whether by one of the parties or by both. Very different was the Roman view. To them it is even less binding than an ordinary business contract. Take for instance a bargain made between *A* and *B* for the sale and purchase of a house. Such a bargain creates what the Romans call an obligation, a bond of law (*vinculum iuris*) which enables either of the contracting parties to require the other to fulfil his promise, or to pay damages in case of default. In Roman law the act of entering into marriage creates no such bond. The business contract can be rescinded only by the consent of both the parties to it. The marriage relation can be terminated by the will of one only. Each party in forming it promised only that he, or she, would remain united to the other so long as he, or she, desired so to remain united. This is the logical consequence of the principle that marriages should be free; this was how the Romans understood that principle.

Accordingly divorce can be effected by either party at his or her pleasure, the doctrine of equality between the sexes being impartially applied, so that the wife may just as freely and easily divorce her husband as the husband may divorce his wife.

The early history of the matter is somewhat obscure, and need not detain us. It would seem probable that in the old days when marriage was accompanied by the Hand power, a husband might put away his wife if she had been convicted before the domestic council of certain grave offences[1]; and we gather that in such cases she was entitled to demand her emancipation, *i.e.* the extinction of the Hand power, by the proper legal method thereto appointed. Such cases were, however, extremely rare. When marriage unaccompanied by Hand power became frequent, we do not at first hear of any divorces. Our authorities declare that the first

[1] A so-called 'law of Romulus' is said to have enumerated poisoning the children, adultery, and the use of false keys as grounds justifying the husband in divorcing his wife, no parallel right being granted to her. And there seems to have been a provision regarding divorce in the Twelve Tables.

instance of divorce at Rome (they probably mean the first where no crime was alleged) was furnished by a certain Spurius Carvilius Ruga, who in B.C. 231 got rid of his wife, although warmly attached to her, on account of her sterility. Universal displeasure fell upon him for his conduct: and when L. Antonius put away his wife without summoning a council of friends and laying the matter before them, the Censors removed him from his tribe. But before long other husbands were found to imitate Spurius Carvilius. In the second century B.C. divorce was no longer rare. In the days of Julius Caesar it had become common, and continued to be so for many generations. The fragrance of religious sentiment had ceased to hallow marriage, and in the general decline of morals and manners it was one of the first institutions to suffer degradation. Not only Cn. Pompey, but such austere moralists as Cato the younger and the philosophic Cicero put away their wives: Cato his after thirty years of wedded life, Cicero two in rapid succession.

How far this decline had gone, even before the days of Cato and Cicero, appears from the singular speech delivered by Q. Caecilius Metellus, Censor in B.C. 131, in which he recommended a law for compelling everybody to marry, observing that if it were possible to have no wives at all, everybody would gladly escape that annoyance, but since nature had so ordained that it was not possible to live agreeably with them, nor to live at all without them, regard must be had rather to permanent welfare than to transitory pleasure[1]. We are told that both men and women, especially rich women, were constantly changing their consorts, on the most frivolous pretexts, or perhaps not caring to

[1] 'Si sine uxore, Quirites, possemus esse, omnes ea molestia careremus, sed quoniam ita natura tradidit ut neque cum illis commode nec sine illis ullo modo vivi possit, saluti perpetuae potius quam brevi voluptati consulendum.' Aul. Gell. *Noct. Att.* i. 6: cf. Liv. *Epit.* Book lix, and Sueton. *Vit. Aug.* Augustus, according to Gellius and Suetonius, caused this speech, delivered a century before, to be read aloud in the Senate in support of his bill *De Maritandis Ordinibus*, as being one which might fitly have been made for their own times.

allege any pretext beyond their own caprice. Nothing more than a declaration of the will of the divorcing party was needed: and this was usually given by the husband in the set form of words, 'keep thy property to thyself' (*tuas res tibi habeto*). Little or no social stigma seems to have attached to the divorcing partner, even to the wife, for public opinion, in older days a rigid guardian of hearth and home, had now, in a rich, luxurious, and corrupt society, a society which treated amusement as the main business of life, come to be callously tolerant. There were still pure and happy marriages, like that of Cn. Julius Agricola (the conqueror of Britain) and Flavia Domitilla; nor is it necessary to suppose that conjugal infidelity was the chief cause why unions were so lightly contracted and dissolved, for the mere whims of self-indulgent sybarites account for a great deal[1]. Still the main facts—the prevalence of divorce, the absence of social penalties, and the general profligacy of the wealthier classes—admit of no doubt.

The Emperor Augustus, though by no means himself a pattern of morality, was so much alarmed at a laxity of manners which threatened the well-being of the community, as to try to restrict divorces by requiring the party desiring to separate to declare his or her intent in the presence of seven witnesses, being all full Roman citizens. This rule, enacted by the *lex Iulia de adulteriis*, and continued down till Justinian's time, does not seem to have reduced the frequency of divorces, though it would tend to render the fact more certain in each case by providing indubitable evidence. Martial and Juvenal present a highly coloured yet perhaps not greatly exaggerated picture of the license of their time; and Seneca truly observes that when vice has become embodied in manners, remedies avail nothing (*Desinit esse remedio locus ubi quae fuerant vitia mores sunt*).

[1] 'Aut minus aut certe non plus tricesima lux est
Et nubit decimo iam Thelesina viro.' Mart. vi. 7.

IX. Influence of Christianity on the Roman Divorce Law.

But a force had come into existence which was to prove itself far more powerful than the legislation of Augustus and his successors. The last thing that these monarchs looked for was a reformation emanating from a sect which they were persecuting, and from doctrines which their philosophers regarded with contempt. Christianity from the first recognized the sanctity of marriage, and when it became dominant (though for a long time by no means omnipotent) in the empire a new era began. The heathen emperors might probably have been glad to check the power of capriciously terminating a marriage, but public opinion, which clung to the principle of freedom, would have been too strong for them. All they did was to impose pecuniary penalties on the culpable party by entitling the husband to retain one-sixth of the *Dos* in case of the wife's infidelity, one-eighth if her faults had been slighter, to which, if there were children, one-sixth was added in respect of each child, but so as not to exceed one-half in all. (The custody of the children belonged to the father in respect of his paternal power.) If the husband was the guilty party, he was obliged to restore the *Dos* at once, instead of being allowed a year's grace.

Constantine and his successors had a somewhat easier task, because the Church had during several generations given to marriage a religious character, surrounded its celebration with many rites, and pronounced her benediction upon those who entered into it. A new sentiment, which looked on it as a union permanent because hallowed was growing up, and must have to some extent affected even heathen society, which remained for a century after Constantine both large and influential. Nevertheless, even the Christian emperors did not venture to forbid divorce. They heightened the pecuniary penalties on the party to blame for a separation by pro-

viding that where the misconduct of the wife gave the husband good grounds for divorcing her, she should lose the whole of the *Dos*, and where it was the husband's transgressions that justified the wife in leaving him, he should forfeit to her the property he had settled, the *donatio propter nuptias*. In both these cases the ultimate ownership of these two pieces of marriage property was reserved to the children, if any, the husband or wife, as the case might be, taking the usufruct or life interest. If there was no *Dos* or *Donatio*, then the culpable party forfeited to the innocent one a fourth part of his or her private property. The definition of misconduct included a frivolous divorce, so that capricious dissolutions were in this way discouraged.

If there were no fault on either side, but one or other partner desired to put an end to the marriage for the sake of entering a convent, or because the husband had been for five years in foreign captivity[1], or because there had never been any prospect of offspring, such a divorce was allowed, and carried no pecuniary penalty with it. It was called *divortium bona gratia*.

Finally, if both the parties agreed of their own free wills to separate—the *divortium communi consensu*—they might do so without assigning any cause or incurring any liability. This rule, which prevailed from first to last, and is recognized even in the Digest and Code of Justinian, was only once broken in upon. In an ordinance issued by Justinian in his later years (*Novella Constitutio* cxxxiv) the pious austerity of the reformer broke out so vehemently as to enact that where husband and wife agreed to divorce one another without sufficient ground, both should be incapable of remarriage and be immured for life in a convent, two-thirds of their property going to their children. Even then, however, the emperor did not venture to pronounce the divorce legally invalid. The will of the parties pre-

[1] The older doctrine had been that foreign captivity destroyed marriage *ipso facto*.

vails, and they die unmarried, though they die in prison. This violation of the established doctrine was, however, too gross to stand. It excited general displeasure, and was repealed by Justin the Second, the nephew and successor of Justinian. So the divorce by consent lasted for some centuries longer, till in an age which had forgotten the ancient Roman ideas and was pervaded by the conception of the marriage relation which religion had instilled, the Emperor Leo the Philosopher declared this form of separation to be invalid.

Through the whole of this legislation on the subject of divorce, which is far more minute and intricate than the briefness of the outline here presented can convey, it is to be noted that the Romans held fast to two principles. One was the wholly private, the other the wholly secular, character of wedlock. There is no legal method prescribed for entering into a marriage, nor any public record kept of marriages. There is no suit for divorce, no public registration of divorce. The State is not invoked in any way. Neither is the Church. Powerful as she had grown before Justinian's time, even that sovereign does not think of requiring her sanction to the extinction of the marriage which in most cases she had blessed. Either party has an absolute right to shake off the bond which has become a fetter. He or she may suffer pecuniarily by doing so, but the act itself is valid, valid against an innocent no less than against a guilty partner, and valid to the extent of permitting remarriage, except (as observed in the last paragraph) for a few years at the end of Justinian's reign.

Religion had consecrated the patrician marriage with the sacred cake in early days, and there had been a public character in the so-called plebeian marriage with the scales and five witnesses. But the marriage of the Christian Empire was (so far as law went) absolutely secular and absolutely private.

X. Some other Features of Roman Marriage Law.

Before leaving this part of the subject, a few minor curiosities of the Roman marriage law deserve to be mentioned. From the time of Augustus there were in force, during some centuries, various provisions[1] designed to promote marriage and the bearing of children by attaching certain burdens or disabilities to the unmarried and childless. Most of these, being opposed to the new sentiment which Christianity fostered, were swept away by the Emperor Constantine and his successors. Others fell into desuetude, so that before Justinian's time few and slight traces were left of statutes that had exerted a great influence in earlier days, though it may be doubted whether they did much to promote morality. The tendency of Christian teaching rather was in favour of celibacy, when adhered to from ascetic motives; and the passion for a monastic life which marked the end of the fourth century told powerfully in this direction, especially in the eastern half of the empire.

Similar sentiments worked to discourage second marriages, which earlier legislation had favoured, though the widow who remarried within the year of mourning (originally of ten, ultimately of twelve months) suffered infamy, by a very ancient custom, as did the person who wedded her. The marriage was, however, valid. The Christian emperors punished the consort who married again by debarring him or her from the full ownership of any property which came to him or her through the first marriage (*lucra nuptialia*), while leaving him (or her) the usufruct in it. But this applied only where there were children of the first marriage living, and was mainly prompted by a desire to protect their interests against a step-parent. The ancient world was singularly suspicious of step-mothers.

[1] Especially those contained in the *lex Iulia et Papia Poppaea*.

The rules with regard to prohibited degrees of matrimony varied widely from age to age. In early Rome even second cousins were forbidden to intermarry. There was in those days a usage permitting near relatives, as far as second cousins, to kiss one another without incurring censure (*ius osculi*). Plutarch oddly explains the permission as grounded upon the right of the male relatives to satisfy themselves in this way that the ladies of the family had not tasted wine. But obviously the wholesome habits of a simple society allowed a familiar intercourse among kinsfolk just as far, and no farther, as the prohibition of marriage between them extended [1]. Towards the end of the republican period, however, we find that even first cousins might marry, probably by custom, for we hear of no specific enactments. Tacitus (*Ann.* xii. 6) refers to the practice as well established. This freedom lasted till the Emperor Theodosius the First, who forbade their marriage under pain of death by burning. Though the penalty was subsequently reduced, marriages of first cousins continued to be forbidden and punishable in the western half of the empire, while in the eastern they were made permissible, and remain so in the system of Justinian. The marriage of uncle or aunt with niece or nephew had been prohibited, though apparently by no statute, until the Emperor Claudius, desiring to marry his brother's daughter Agrippina, obtained a decree of the Senate declaring such a marriage legal [2]. So it remained for a time, though the marriage of an uncle with a sister's daughter, or of an aunt with a nephew, was still deemed incestuous. Christianity brought a change, and the law of Claudius was annulled by the sons of the Emperor Constantine. It was also by these sovereigns that marriage with a deceased wife's sister, or a deceased hus-

[1] It is a curious instance of the variance of custom in this respect, that after it had in England become unusual for cousins of different sexes to kiss one another, the practice remained common in the simpler society of Scotland and still more in that of Ireland.

[2] Tac. *Ann.* xii. 5-7.

band's brother, which had previously been lawful, though apparently regarded with social disapproval, was expressly forbidden [1]. This rule was adopted by Justinian, in whose *Codex* it finds a place [2].

Besides the full lawful marriage of Roman citizens, to which alone the previous remarks have referred, there were two other recognized relations of the sexes under the Roman law [3]. One of these was the marriage of a citizen, whether male or female, with a non-citizen, *i.e.* a person who did not enjoy that part of citizenship which covered family rights and was called *connubium*. This was called a natural marriage (*matrimonium naturale, matrimonium iuris gentium*) as existing under the Law of Nature or Law of the Nations (*ius gentium*), as contradistinguished from the peculiar law of Rome (*ius civile*) [4]. It was a perfectly legal union, and the children were legitimate: as of course were the children of two non-citizens who married according to their own law. When Roman citizenship became extended to all the subjects of the empire, the importance of this kind of marriage vanished, for it could thereafter have been applicable (with some few exceptions) only to persons outside the Empire, and marriages with such persons, who were *prima facie* enemies, were forbidden.

The other relation was that called concubinage (*concubinatus*). It was something to which we have no precise analogue in modern law, for, so far from being prohibited by the law, it was regulated thereby, being treated as a lawful connexion. It is almost a sort of unequal marriage (and is practically so described by some of the jurists) existing between persons of different station—the man of superior rank, the woman of a rank

[1] Many other prohibitions of marriages applying to persons holding official relations, or to persons of widely different rank, or to cases where adoptive relationships come in, need not be mentioned, as they have no longer any great interest.

[2] *Cod. Theod.* iii. 12, 2 sqq.; *Cod. Iustin.* v. 5. 5 and 8.

[3] The connexion of two slaves, called *contubernium*, was not deemed a legal relation at all, and children born from it were not legitimate. So also a free person could not legally intermarry with a slave.

[4] See Essay XI, p. 570.

so much inferior that it is not to be presumed that his union with her was intended to be a marriage. It leaves the woman in the same station in which it found her, not raising her, as marriage normally does, to the husband's level. The children born in such a union are not legitimate; but they may require their father to support them, and are even allowed by Justinian, in one of his later enactments (*Novella* lxxxix), a qualified right of intestate succession to him. They of course follow their mother's condition, and they have a right of inheriting her property. Even here the monogamic principle holds good. A man who is married cannot have a concubine, nor can any man have more than one concubine at a time. Though regarded with less indulgence by the Christian emperors than it had been by their predecessors, it held its ground in the Eastern Empire, even under Justinian, who calls it a 'permitted connexion' (*licita consuetudo*), and was not abolished till long after his time by the Emperor Leo the Philosopher in A.D. 887. In the West it became by degrees discredited, yet doubtless had some influence on the practice of the clergy, the less strict of whom continued to maintain irregular matrimonial relations for a great while after celibacy had begun to be enforced by ecclesiastical authority.

Children born in concubinage may be legitimated by the subsequent marriage of their parents, according to a rule first introduced by Constantine, and subsequently enlarged and made permanent by Justinian (*Cod.* v. 27, 5 and 6; *Nov.* xii. 4; *Nov.* lxxxix. 8); a rule of great importance, which was long afterwards introduced into the Canon Law by Pope Alexander III in A.D. 1160, and has held its ground in the modern Roman law of continental Europe, as it does in the law of Scotland to this day. The bishops, prompted by the canonists, tried to introduce it in England, but were defeated by the opposition of the barons, who at the great council held at Merton in 20 Henry III (A.D. 1235-6) refused

their consent in the famous words, 'We will not change the laws of England which hitherto have been used and approved[1].' Nevertheless such power of legitimating the children of a couple born before their legal marriage seems to have been part of the ancient customs of England before the Conquest. The children were at the wedding placed under a cloak which was spread over the parents, and were from this called in Germany, France, and Normandy, 'mantle children[2].'

I have already dwelt upon the most striking feature of the branch of legal history we have been tracing, the comparatively sudden passage from a system of extreme strictness—under which the wife's personality, with her whole right of property, became absolutely merged in that of her husband—to a system in which the two personalities remained quite distinct, united only by the rights which each had in matrimonial property, rights which were however not rights of joint-management, but exercisable (subject to limitations) by the husband alone so long as the marriage lasted, while the reversion was secured to the wife or her relatives. It is hardly less noteworthy that these two contrasted systems did for a considerable time exist side by side; and for a century, or perhaps more, must both have been in full vigour, though the freer system was obviously gaining ground upon the older and more stringent one.

Another fact, though more easily explicable, is also worth noting. In its earlier stages the Roman marriage bore a religious character, for we can hardly doubt that in primitive times Confarreation, the old patrician form with the sacrifice and the holy cake, was practically

[1] 'Ad breve Regis de bastardia utrum aliquis natus ante matrimonium habere poterit hereditatem sicut ille qui natus est post. Responderunt omnes Episcopi quod nolunt nec possunt ad istud respondere, quia hoc esset contra communem formam Ecclesie. Ac rogaverunt omnes Episcopi Magnates ut consentirent quod nati ante matrimonium essent legitimi sicut illi qui nati sunt post matrimonium quantum ad successionem hereditariam quia Ecclesia tales habet pro legitimis; et omnes comites et barones una voce responderunt quod nolunt leges Anglie mutare que usitatate sunt et approbate.' 20 Henr. III, *Stat. Mert.*

[2] Pollock and Maitland, vol. ii. p. 397. I have heard of the cloak custom as existing in Scotland down almost to our own time.

universal among the original citizens, before the *plebs* came into a separate and legally recognized existence. Hence perhaps it is that marriage is described, even when that description had ceased to have the old meaning, as a 'sharing of all rights, both religious and secular.' In its middle period, which covers some five centuries, it was a purely civil relation, not affected, in its legal aspects, by any rules attributable to a theological or superstitious source. But when Christianity became the dominant faith of the Empire, the view which the Gospel and the usages as well as the teaching of the Church had instilled began thenceforward to influence legislation. These usages did not indeed, down till the eighth century, transform the fundamental conception of marriage as a tie formed solely by consent, and needing the intervention neither of State nor of Church. But they worked themselves into the doctrines of the Church in such wise that, in later days, they succeeded in making matrimony so far a sacred relation as to give it an indissoluble character, and not only restricted the circle of persons between whom it could lawfully be contracted, but abolished the power of terminating it by the mere will of the parties.

XI. Marriage under the Canon Law.

When direct legislation by the State came to an end in Western Europe with the disappearance of the effective power of the Emperors in the fifth and sixth centuries, the control of marriage began to fall into the hands of the Church and remained there for many generations. To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit. It would be impossible within the limits of this Essay

to describe that law, which is copious, and embarrassed by not a few controverted points. All that it seems necessary to say here is that the Canon Law, which was collected and codified in the thirteenth and fourteenth centuries, so far adhered to the established Roman doctrine as to recognize, down till the Council of Trent, the main principle that marriage requires nothing more than the free consent of the parties, expressed in any way sufficient to show that the union which they contemplate is to be a permanent and lawful union. Marriage no doubt became, in the view of the mediaeval Church, as of the Roman Church to-day, a sacrament, but it is a sacrament which the parties can enter into without the aid of a priest. Their consent ought, no doubt, in the view of the Church and of Canon law, to be declared before the priest and to receive his benediction. It is only marriages 'in the face of the Church' that are deemed 'regular' marriages [1], and the Fourth Lateran Council under Innocent the Third directed the publication of banns. But the irregular marriage is nevertheless perfectly valid. It is indissoluble (subject as hereinafter mentioned), and the children born in it are legitimate. A good ground for this indulgence may be found not only in Roman traditions, but also in the fact that the Church was anxious to keep people out of sin and to make children legitimate, so that it always presumed everything it could in favour of lawful matrimony.

This view prevailed, and may be said to have been the common law of Christendom, as it had been of the old Roman Empire, down till the Council of Trent [2]. That assembly, against the strong protests of some of its members, passed a decree (Sessio XXIV, cap. i,

[1] See Lord Stowell's famous judgement in *Lindo* v. *Belisario* (*Consist. Cases*, p. 230), where he examines in an interesting way the requisites of marriage under the 'law of nature.'

[2] Canon VII of Session XXIV anathematizes those who deny the teaching of the Church that the adultery of one spouse does not dissolve the *vinculum matrimonii*, and Canon X those who deny that it is better and happier to remain in a state of virginity or celibacy.

De Reformatione Matrimonii) which, after reciting that clandestine marriages had been held valid, though blameworthy, declared that for the future all should be deemed invalid unless they took place in the presence of a priest and of two or three witnesses. Apparently it was not so much for the sake of securing the blessing of the Church upon every marriage as in order to prevent scandals which had arisen from the breach of a tie contracted in secret that the change, a grave and memorable change, was made. This great Council, which was intended to secure the union of Christendom under the See of Rome, really contributed to intensify the separatist forces then at work: and from it onwards one can no longer speak of a general marriage law even for Western Europe. Custom and legislation took thenceforward different courses, not only as between Protestant and Roman Catholic nations, but even as between different Protestant nations, there being no common ecclesiastical authority which Protestant States recognized. Thus the era of the Reformation is an era as marked in the history of marriage law as was the era of Constantine, when Christianity began to be dominant in the Roman Empire. And we shall see, when we return to the subject of divorce, that this is even more strikingly the case as regards the dissolubility of marriage than as regards the mode of contracting it.

Before passing on to sketch the legal history of the institution in England—since it is impossible to find space here for an account of its treatment in the laws of other European States—it is well to note what had been the general tendency of the customary law of the Middle Ages upon the character of the marriage relation.

One may sum up that tendency by saying that it had virtually expunged the free and simple marriage of the Romans under the later Republic and the Empire, and had substituted for it a system more closely resembling

that of the religious marriage with Hand power of early Rome. The ceremony had practically become a religious one, though till the Council of Trent a religious service was not absolutely essential to its validity. The relation had become indissoluble, except by the decree of the Pope, who in this, as in some other respects, practically filled the place of the old Roman Pontifex, though of course both confarreation and the pontiff had been long forgotten[1]. It carried with it an absorption of the personality of the English wife into that of the husband, whereby all her property passed to him and she became subject to his authority and control. These conditions were the result partly of Teutonic custom, partly of the rudeness of life and manners; and such check as was imposed on them came from the traditions of the Roman law, and from the favour which the Canon law, much to its credit, showed to the wife. Of this favour some have found a trace in the phrase that occurs in the 'Form for the Solemnization of Matrimony' in the liturgy of the Church of England, where the bridegroom is required to say to the bride, 'with all my worldly goods I thee endow'; although, in point of fact, the law of England gives to the bride only a very limited (and now easily avoidable) right to one-third of the husband's real estate after his death[2].

XII. The English Law of Marriage.

The influence of the Roman system was, of course, less in England than in countries where, as in France and Italy, the Roman law had maintained itself in force,

[1] The pontifices had a certain oversight over the sacred marriage by *confarreatio*, and their action was needed to effect a *diffareatio*, when it was desired to extinguish the *manus* of the husband over a divorced wife.

[2] Others think that this expression, which would seem to refer not to real property but to chattels, is a relic of ancient Teutonic custom. As is observed by Messrs. Pollock and Maitland (*History of English Law*, vol. ii. p. 401), we must not assume that, from the days of savagery down to our own, all changes have been in favour of women. They had apparently more power over their own property in Anglo-Saxon times than in the thirteenth century.

either as written law or as the basis of customary law. But now that we come to consider the course which the English law of marriage has taken, let us note that this law has flowed in two distinct channels down till our own time. So much of it as pertained to the marriage relation itself, that is to say, to the capacity for contracting marriage (including prohibited degrees), to the mode of contracting it, and to its dissolution, complete or partial, belonged to the canon or ecclesiastical law and was administered in the spiritual courts. So much of it as affected the property rights of the two parties (and especially rights to land) belonged to the common law and was administered in the temporal courts. This division, to which there is nothing parallel in the classical Roman law, was of course due to the fact that mediaeval Christianity, regarding marriage as a sacrament, placed it under the control of the Church and her tribunals in those aspects which were deemed to affect the spiritual well-being of the parties to it. Nevertheless the line of demarcation between the two sides was not always, and indeed could hardly be, sharply or consistently drawn. The ecclesiastical courts had a certain jurisdiction as regards property. The civil courts were obliged, for the purposes of determining the right of a woman to dower and the rights of intestate succession, to decide whether or no a proper and valid marriage had been contracted. Their regular course apparently was to send the matter to the bishop's court, and act upon the judgement which it pronounced. But this was not always done. They often had to settle the question for themselves, applying, no doubt, as a rule the principles which the bishop's court would have followed, and (as has been explained by the latest and best of our English legal historians [1]) they often evaded the question of whether there had been a canonically valid marriage by finding that, as a matter of fact, the parties had been

[1] Messrs. Pollock and Maitland, in their admirable *History of English Law*, to which the reader curious in these matters may be referred.

generally taken to have been duly wedded, and by proceeding to give effect to this finding.

The ecclesiastical lawyers were not successful in their treatment of such questions as fell within their sphere. The effort to base legal rules on moral and religious principles leads naturally to casuistry, and away from that common-sense view of human transactions and recognition of practical convenience which ought to be the basis of law. They multiplied canonical disabilities arising whether from pre-contract, a matter to which they gave a far greater importance than had previously belonged to it, or from relationship, either of consanguinity or of affinity; and they indeed multiplied these impediments to such an extent as to make the capacity of any two parties to enter into matrimony matter of doubt and uncertainty, giving wide opportunities for chicane, and an almost boundless scope for the interposition of the Roman Curia, whose sale of dispensations became a fertile and discreditable source of revenue. Their treatment of divorce will be presently examined. In their zeal to keep Christian people out of sin they recognized many clandestine unions as valid, though irregular, marriages, while at the same time applying strict rules of evidence which practically withdrew much of the liberty that had been granted by the lax theory of what constituted a marriage. These tangled subtleties regarding pre-contracts and prohibited degrees were at the time of the Reformation swept away by a statute of 1540 (32 Henry VIII, c. 38), which declared that all marriages should be lawful which were ' not prohibited by Goddis lawe,' and that ' no reservation or prohibition, Goddis lawe except, shall trouble or impeche any marriage without the Levitical degrees.'

Two principles, however, remained unaffected by the legislation of this period in England. The one was the indissolubility of marriage, a topic to which I shall presently return. The other was the freedom of entering into it, consent, and consent alone, being still all that

was necessary to make a marriage valid[1]. England, of course, did not recognize the decrees of Trent, so the old law continued in force after that Council, though motives like those which had guided the Council induced the ecclesiastical courts to lean strongly in favour of the almost universal practice of marrying before a clergyman, and to require in all other cases very strict evidence that a true consent, directed to the creation of lawful matrimony, had in fact been given. Moreover, where the marriage had been irregular, the spiritual courts might compel its celebration in the face of the Church. So things went on, with much uncertainty and some confusion between the act needed to constitute marriage and the evidence of that act, till the middle of the eighteenth century, when a statute was passed in A.D. 1753 (26 Geo. II, c. 33) which required all marriages to be celebrated by a clergyman and in a church (unless by dispensation from the Archbishop of Canterbury), and prescribed other formalities[2]. These provisions remained in force (except as to Jews and Quakers) until 1836, when a purely civil marriage before a Registrar was permitted as an alternative to the ecclesiastical ceremony[3]. During the Commonwealth marriages had been contracted before justices of the peace, but the Restoration legislation, while validating the marriages so formed, abolished the practice. The old law remained in Ireland, and that was how the question what kind of marriage ceremony was required by the common law came before the House of Lords in the famous case of *Reg.* v. *Millis*, which was an Irish appeal, and the decision

[1] The House of Lords was equally divided upon this point in the case of *Reg.* v. *Millis*, in 1843: but historical inquiry tends to confirm the view of Lord Stowell, that the presence of a clergyman was not essential (see *Dalrymple* v. *Dalrymple*, 2 Haggard, p. 54).

[2] The English Dissenters soon began to complain of this Act, as they were thenceforth (until 1836) obliged to be married in church. Charles James Fox used to denounce the Act as 'contrary to the Law of Nature.'

[3] A civil marriage is not, however, compulsory in England as it is in France and some other continental countries. In Scotland it has now become fashionable for Presbyterians to be wedded in church, but the Scottish law, as every one knows, does not prescribe either a clergyman or a registrar.

in which, declaring that by the common law the presence of a clergyman was required to make a marriage valid, seems to have been erroneous.

XIII. Property Relations of the Consorts under English Law.

Now let us turn to the effect of marriage in the law of England upon the property and the personal rights of the wife.

That effect has generally been described as making the two consorts one person in the law. Such they certainly were for some purposes under the older Common Law of England. The husband has the sole management of all the property which the wife had when married, or which she subsequently received or earned by her exertions. In acquiring all her property he becomes also liable for the debts which she owed before marriage, but after marriage he has not to answer for any contract of hers, because her agreements do not bind him except for necessaries. He is, moreover, liable for wrongs done by her. He cannot grant anything to her, or covenant with her; and if there was any contract between him and her before marriage, it disappears by her absorption into his personality. She can bring no action without joining him as plaintiff, nor can she be sued without joining him as defendant. She cannot give evidence for or against him (save where the offence is against herself); and if she commit a crime (other than treason or murder) along with him, she goes unpunished (though for crimes committed apart from him she may be prosecuted), on the hypothesis that she did it under his compulsion. So in a case, in the thirteenth century, where husband and wife had produced a forged charter, the husband was hanged and the wife went free, 'because she was under the rod of her husband' (*quia fuit sub virga viri sui*[1]).

[1] Pollock and Maitland, vol. ii. ch. vii. p. 404 (quoting Bracton, 429 b).

But this theory of unity is not so consistently maintained as was the similar theory of the Romans regarding the marriage with Hand power. For the wife's consent to legal acts may be effectively given where she has been separately examined by the Court to ascertain that her consent is free; and even the fact that she must be joined in legal proceedings taken by or against her shows that she has a personality of her own, whereas under the Roman *manus* she was wholly sunk in that of her husband. Thus it is better not to attempt to explain the wife's position as the result of any one principle, but rather to regard it as a compromise between the three notions of absorption, of a sort of guardianship, and of a kind of partnership of property in which the husband's voice normally prevails.

As respects her personal safety, she was better off than the Roman wife of early days, for the husband could punish the latter apparently even with death, after holding a domestic council, whereas the English husband could do no more than administer chastisement, and that only to a moderate extent. The marital right of chastisement seems to have been an incident to marriage in many rude societies. A traveller among the native tribes of Siberia relates that he found a leather whip usually hung to the head of the conjugal bed, almost as a sort of sacred symbol of matrimony; and he was told that the wife complained if her husband did not from time to time use the implement, regarding his neglect to do so as a sign of declining affection. And it would seem that this notion remains among the peasantry of European Russia to this day[1].

Everybody has heard of the odd habit of selling a wife which still occasionally recurs among the humbler classes in England; and most people suppose that it descends from a time when the Teutonic husband could sell his consort, as a Roman one apparently could in the days of Hand power. There is, however, no trace

[1] Kovalevsky, *Modern Customs and Ancient Laws of Russia*, p. 44.

at all in our law of any such right [1], though a case is reported to have arisen in A.D. 1302, when a husband granted his wife by deed to another man, with whom she thereafter lived in adultery [2].

The compensation given to the English wife for the loss (or suspension during the marriage) of her control over her property is to be found in her right of Dower, that is, of taking on her husband's death one-third of such lands as he was seised of, not merely at his death, but at any time during the marriage, and which any issue of the marriage might have inherited. As this right interfered with the husband's power of freely disposing of his own land, the lawyers set about to find means of evading it, and found these partly in legal processes by which the wife, her consent being ascertained by the courts, parted with her right, partly by an ingenious device whereby lands could be conveyed to a husband without the right of dower attaching to them, partly by giving the wife a so-called jointure which barred her claim. The wife has also a right, which of course the husband can by will exclude, of succeeding in case of intestacy to one-third of his personal property, or, if he leave no issue, to one-half.

This state of things hardly justifies the sleek optimism of Blackstone, who closes his account of the wife's position by observing, 'even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of England.' The Romans, although they allowed to women a fuller independence, were more candid when they said: 'In many points of our law the condition of the female sex is worse than that of the male.'

[1] My friend Mr. F. W. Maitland, whose authority on these matters is unsurpassed, informs me that he knows of no such trace. The practice, however, seems to have been not uncommon. Several instances of the sale of a wife by auction, sometimes along with a child, are reported from Kent between 1811 and 1820.

[2] See Pollock and Maitland, vol. ii. p. 395.

XIV. Gradual Amendment of the English Matrimonial Law.

However, the Courts of Equity ultimately set themselves in England to improve the wife's condition. They recognized some contracts and grants between husband and wife. They allowed property to be given to trustees for the sole and separate use of a wife; and if it was given to her with an obvious intent that it should be for her exclusive benefit, they held the husband, in whom by operation of the general law it would vest, to be a trustee for the wife. When during marriage there came to a wife by will or descent any property of which the husband could obtain possession only by the help of a Court of Equity, they required him to settle a reasonable part of it upon the wife for her separate use. And in respect of her separate property, they furthermore permitted the wife to sue her husband, or to be sued by him. While these changes were in progress, there had grown up among the wealthier classes the habit of making settlements on marriage which secured to the wife, through the instrumentality of trustees, separate property for her sole use, and wherever a woman was a ward of Court, the Court insisted, in giving its consent to the marriage, that such a settlement should be made for her benefit.

By these steps a change had been effected in the legal position of women as regards property similar to, though far more gradual, and in its results falling far short of, the change made at Rome when the marriage without Hand power became general. But in England a recourse to the Courts has always been the luxury of the rich; and as the middle and poorer classes were not wont to go to the Courts, or to make settlements, it was only among the richer classes that the wife's separate estate can be said to have existed. At last, however, the gross injustice of allowing a selfish or wasteful husband to seize his wife's earnings and

neglect her was so far felt that several Acts were passed (the first in 1857), under which a woman deserted by her husband may obtain from a magistrate a judicial order, protecting from him any property she may acquire after desertion. By this time an agitation had begun to secure wider rights for married women. It had great difficulties to overcome in the conservative sentiment of lawyers, and of those who are led by lawyers, and more especially of members of the House of Lords.* Not till 1870 did the British Parliament take the step which the Romans had taken long before the Christian era, and which many American States had taken in the first half of the nineteenth century. A statute of that year, amended and extended by others of 1874 and 1882, swept away the old rule which carried all the wife's property over to the husband by the mere fact of marriage; so that now whatever a woman possesses at her marriage, or receives after it, or earns for herself, remains her own as if she were unmarried, while of course the husband no longer becomes liable by marriage to her ante-nuptial debts. By these slow degrees has the English wife risen at last to the level of the Roman. The practice of making settlements on marriage still remains, especially where the wife's property is large, or where there is any reason to distrust the bridegroom; for though the interposition of trustees is no longer needed to keep the property from falling by operation of law into the husband's grasp, he may still press or persuade her to part with it, since she now enjoys full disposing power, and if she does part with it, she and the children may suffer. Thus custom sustains in England, and perhaps will long sustain, a system resembling that of the Roman *Dos*. Yet the number of persons possessing some property who marry without a settlement increases, as does the number of women whose strength of will and knowledge of business enables them to hold their own against marital coaxing or coercion.

It need hardly be said that the personal liberty of the wife was established long before her right to separate property. Says Blackstone (writing in 1763):—

'The husband by the old law might give his wife moderate correction. For as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with his power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet.* But in the politer reign of Charles the Second this power of correction began to be doubted, and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the Courts of Law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour[1].'

This touching attachment to their old common law still survives among 'the lower rank of people' in the form of wife beating. But among the politer classes the right to restrain a consort's liberty (except under very special circumstances) may be deemed to have become exploded since the case of *Reg.* v. *Jackson* in 1891[2]. So that now the English wife, like the Roman, may quit her husband's house when she pleases, and the suit for restitution of conjugal rights, whereby either could compel the other to live in the common household, is falling into disuse, if indeed it can still be described as in any sense effective since the Act, passed in 1884, which took away the remedy by attachment.

[1] Blackstone, *Commentaries*, vol. i. bk. i. chap. 15.

[2] 1 Q. B. p. 671 (in the Court of Appeal). The judgements are instructive. The Master of the Rolls goes so far as to doubt whether the husband ever had a legal power of correction, a curious instance of the way in which the sentiment of a later time sometimes tries to force upon the language of an older time a non-natural meaning, the new sentiment being one which the older time would have failed to understand. It would have been simpler to admit that what may well have been law in the seventeenth century is not to be taken to be law now, manners and ideas having so completely changed as to render the old rules obsolete.

The interest which belongs to these changes in the law, changes generally similar in their result in the English and in the Roman systems, though far more gradually made in the former than in the latter, is the interest of observing the methods whereby custom and legislation have sought to work out different possible theories of the marriage relation. There are usually said to be two theories, that of Mastery, and that of Equality. On the former the husband is lord of the wife's property as well as of her person. The law puts her at his mercy, trusting that affection, public opinion, and a regard for domestic comfort will restrain the exercise of his rights. On the other theory, each consort is a law to him- or herself, each can dispose of his or her property, time, and local presence without the assent of the other. The law allows this freedom in the hope that affection, respect, and the opinion of society will prevent its abuse. Yet these two theories, that with which both Rome and England began, that with which both Rome and England have ended, do not exhaust the possibilities of the relation. For there is a third theory which, more or less consciously felt to be present, has influenced both the one and the other, creating a sort of compromise between them. It is the theory of a partnership in social life and in property similar to the partnership which necessarily exists as regards the children of a marriage. This idea is expressed by the form which the Mastery theory took when it declared husband and wife to be 'one person in the law,' and in the Anglican marriage service where the wife's promise to obey [1] is met by the husband's declaration that he endows her with all his worldly goods. It also qualifies the theory of Equality and Independence by the practice of creating a settlement in England, and a *Dos* (and *Donatio propter nuptias*) at Rome, in which each of the married pair has an interest.

[1] This promise does not appear in the forms of marriage service commonly used by the unestablished churches of England, or most of them.

Any one can see that the Mastery theory, against which modern sentiment revolts, was more defensible in a time of violence, when protection for life and property had to be secured by physical force as well as by recourse to the law, than it is to-day. Any one can also see that there are even to-day households for which the Mastery theory may be well suited, as there also are, and always have been, even in days of rudeness and in Musulman countries, other households where the wife was, and rightly was, the real head of the family. Those moreover who, judging of other times by their own, think that the position of the wife and of women generally must have been, under the Mastery theory, an intolerable one, need to be reminded not only that the practical working of family life depends very largely on the respective characters of the persons within the family, and on the amount of affection they entertain for one another, but also that it is profoundly modified by the conception of their relations which rules the minds of these persons. Law, itself the product and the index of public opinion, moulds and solidifies that conception, and the wife of the old stern days of marital tyranny saw no indignity or hardship in that position of humble obedience which the independent spirit of our own time resents.

XV. Divorce under the Canon Law.

There is one more point in which opposite theories of marriage have to be contrasted, and in which the contrast appears most strikingly. This is the point which touches the permanence of the relation.

We have already seen what were the provisions of the Roman law upon the subject of Divorce. Those provisions continued to prevail in Western Europe after the fall of the Empire, until, apparently in the eighth, ninth, and tenth centuries, new rules enforced by the Church superseded them in the regions where the im-

perial law had been observed. A similar change occurred later in other countries such as England and Germany, where the ancient customs of the barbarian tribes had allowed the husband, and apparently in some cases the wife also, to dissolve the marriage and depart. From the twelfth century onwards the ecclesiastical rules and courts had undoubted control of this branch of law all over Christian Europe. Now the Church held marriage to be a sacrament and to be indissoluble. Divorce, therefore, in the proper sense of the term, as a complete severance of a duly constituted matrimonial tie, was held by the Church inadmissible. This view was based on the teaching of our Lord as given in the Gospels [1], and was enforced on every bridal pair in the liturgical form employed at marriage, as indeed it is in the English liturgy to-day. Nevertheless, the Church recognized two legal processes which were popularly, though incorrectly, called divorces.

One of these, called the divorce from the bond of marriage (*a vinculo matrimonii*), was in reality a declaration by ecclesiastical authority—that of the Pope, or a deputy acting under him—that the marriage had been null from the beginning on the ground of some canonical impediment, such as relationship or pre-contract. As already observed, the rules regarding impediments were so numerous and so intricate that it was easy, given a sufficient motive, whether political or pecuniary, to discover some ground for declaring almost any marriage invalid. The practice of granting divorces of this class, which was constantly made a means of obliging the great ones of the earth and augmenting papal revenues, may sometimes have been really useful for the purpose of dissolving the ill-assorted unions of those who could secure a decree from the ecclesiastical authorities. Technically, however, it was not a dissolution of marriage, but a declaration that no marriage had ever

[1] Messrs. Pollock and Maitland refer to the dooms of Aethelbert as showing the permissibility of divorce in early English law (*History of English Law*, vol. ii. p. 390).

existed, and therefore it rendered children born in the relation illegitimate [1].

The other kind of divorce was that called 'from board and bed' (*a mensa et thoro*). It was a regular part of the jurisdiction of the Church Courts, and effected a legal separation of the two parties from their joint life in one household, while leaving them still man and wife, and therefore unable to marry any other person. The status of the children was of course not affected.

XVI. The Later Law of Divorce in England and Scotland.

This law prevailed over all Europe till the Reformation, and continued to prevail in all Roman Catholic countries till a very recent time. In some it still prevails, at least so far as Roman Catholics are concerned. But in most Protestant countries it received a fatal shock from the denial, in which all Protestants agreed, of the sacramental character of marriage, and from the revival, in some of such countries, of the view of marriage as a purely civil contract. Thus in Scotland the courts began, very soon after the Roman connexion had been repudiated, to grant divorces; and in A.D. 1573 a statute added desertion to adultery as a ground for divorce. In England, however, where the revulsion against the doctrines of mediaeval Christianity was less pronounced, and where the Ecclesiastical Courts retained their jurisdiction in matrimonial causes, the old law went on unchanged, save that after the abolition of many of the canonical impediments, mentioned above, divorces *a vinculo*, declaring marriages to have been originally invalid, became far more rare. Nevertheless, attempts had been made by some of the more energetic English Reformers to assert the dissolubility of marriage. A draft ecclesiastical code (called the *Reformatio*

[1] But canonical ingenuity discovered methods by which in some cases the legitimacy of the children might be saved though the marriage was declared void.

legum ecclesiasticarum) was prepared, but never enacted; and Milton argued strongly on the same side in his well-known but little read book. About his time cases begin to occur in which marriages were dissolved by Acts of Parliament; a practice which became more frequent under the Whig régime of the early Hanoverian kings, and ultimately ripened into a regular procedure by which those who could afford the expense might secure divorces. The party seeking divorce was required to first obtain from the Ecclesiastical Court a divorce *a mensa et thoro*, which obtained, he introduced his private Bill for a complete divorce. It was heard by the House of Lords as a practically judicial matter, in which evidence was given, and counsel argued the case for and (if the other party resisted) against the divorce. It was usually by the husband that these divorce Bills were promoted, and indeed no wife so obtained a divorce till A.D. 1801 [1].

This characteristically English evasion of that principle of indissolubility for which such immense respect was professed lasted till 1857, long before which time the existence of a law which gave to the rich what it refused to the poor had become a scandal [2]. In that year an Act was passed, not without strenuous opposition from those who clung to the older ecclesiastical theory, which established a new Court for Divorce and Matrimonial causes, empowered to grant either a complete dissolution of marriage (divorce *a vinculo matrimonii*) or a 'judicial separation' (divorce *a mensa et thoro*). This statute adhered to the rule which the practice of the House of Lords had established, and under it a husband may

[1] There had also sprung up the practice of effecting private separations between a husband and a wife by means of a deed executed by each of them, and such a deed presently came to be recognized as a defence to a suit by either party for the restitution of conjugal rights.

[2] Probably the English Jews were permitted to exercise in the seventeenth and eighteenth centuries the right of divorce which their own law gave them. But in those days the Jews were so cut off from the general English society that the phenomenon passed almost unnoticed. They were a very small community, living practically under their personal law, as the Parsis do in Western India to-day.

obtain a divorce on proof of the wife's infidelity, whereas the wife can obtain it only by proving, in addition to the fact of infidelity on the husband's part, either that it was aggravated by bigamy or incest, or that it was accompanied by cruelty or by two years' desertion. To prevent collusion a public functionary called the Queen's Proctor is permitted to intervene where he sees grounds for doing so. Misconduct by the husband operates as a bar to his obtaining a divorce. Thus the law of England stands to-day. Attempts have been made to alter it on the basis of equality, so that whatever misconduct on the wife's part entitles a husband to divorce shall, if committed by the husband, entitle her likewise to have the marriage dissolved. But these attempts have not so far succeeded [1].

The law of Scotland is more indulgent, and not only permits a wife to obtain divorce for a husband's infidelity alone, but also recognizes wilful desertion for four years as a ground for divorce. In other respects its provisions are generally similar to those of the English law. Ireland, however, remains under the old pre-Reformation system. There is no Divorce Court, and no marriage can be dissolved save by Act of Parliament. The bulk of the people are Roman Catholics, and among Protestants as well as Roman Catholics the level of public sentiment and of conjugal morality has apparently been higher than in England, nor have attempts been made, at any rate in recent years, to obtain the freedom which England and Scotland possess. The United Kingdom thus shows within its narrow limits the curious phenomenon of three dissimilar systems of law regulating a matter on which it is eminently desirable that the law should be uniform. England has a comparatively strict rule, and one which is unequal as between the two parties. Scotland is somewhat laxer,

[1] The Act of 1857 (amended in some points by subsequent statutes) contains provisions intended to prevent collusion between the parties, and empowers the Court to regulate the property rights of the divorced persons and the custody of the children (if any) of the marriage.

but treats both parties alike. Ireland has no divorce at all. So little do theoretical considerations prevail against the attachment of a nation to its own sentiments and usages.

I reserve comments on these systems till we have followed out the history of the English matrimonial law in the widest and most remarkable field of its development, the United States of America.

XVII. The Divorce Laws of the United States.

When the thirteen Colonies proclaimed their separation from Great Britain in 1776, they started with the Common Law and all such statute law as had in fact been in force at the date of the separation. Accordingly they had no provision for dissolving marriages, nor any Ecclesiastical Courts to grant dissolutions, seeing that such tribunals had never existed in America, where there had been no bishops. Presently, however, they began to legislate on the subject, and the legislation which they, and the newer States added to the Union since 1789, have produced presents the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free, self-governing communities have ever tried. Both marriage and divorce belong, under the American Constitution, to the several States, Congress having no right to pass any laws upon the subject, except of course for the District of Columbia and the Territories. Thus every one of the (now) forty-five States has been free to deal with this incomparably difficult and delicate matter at its own sweet will, and the variety of provisions is endless. As it would require a great deal of space to present these in detail, I shall touch on only some salient points.

Originally, the few divorces that were granted were obtained, following the example of England, by means of Acts of the State legislature. The evils of this plan

were perceived, and now nearly all the States have by their Constitutions forbidden the legislature to pass such Acts, since Courts have been provided to which application may be made. These are usually either the ordinary inferior Courts of the State, or the Chancery Courts (where such survive). No State seems to have, like England, erected a special Court for the purpose. One State only, South Carolina, does not recognize divorce at all. In 1872, under the so-called 'carpet-bagger government,' set up after the War of Secession, a statute was passed in that State authorizing divorces for infidelity or desertion, but in 1878, when the native whites had regained control, this statute was repealed, so that now, if a divorce is obtained at all, it must be obtained from the legislature outside the regular law. South Carolina has the distinction of being to-day probably the only Protestant community in the world which continues to hold marriage indissoluble. No State has fewer Roman Catholic citizens: Presbyterians and Methodists are the strongest religious bodies.

The causes for which divorce may be granted range downwards from the strictness of such a conservative State as New York, where conjugal infidelity is the sole cause recognized for an absolute dissolution of the marriage, to the laxity of Washington, where the Court may grant divorce 'for any cause deemed by it sufficient, and when it shall be satisfied that the parties can no longer live together.' Desertion is in nearly all States recognized as a ground for dissolution. So is cruelty by either party, or the reasonable apprehension of it by either. So in many States the neglect of the husband to provide for the wife, habitual intemperance, indignities or insulting treatment, violent temper, and (in a smaller number) the persistent neglect of her domestic duties by the wife, grave misconduct before marriage unknown to the other party, insanity, an indictment for felony followed by flight, vagrancy, are, or have been, prescribed as among the sufficient grounds

for divorce. In some States a sentence of imprisonment for life *ipso iure* annuls the marriage of the prisoner, permitting the other partner to remarry, and, in most, conviction for felony or infamous crime is a ground on which the Court may decree, and presumably will decree, the extinction of the marriage. Moreover, there are still a few States where over and above the judicial process open to a discontented consort, the State legislature continues to grant divorces by special statutes. Delaware is, or very recently was, such a State; and in the twenty years preceding 1887 it would seem that four-fifths of its divorces, not indeed very numerous (289 for twenty years), were so obtained. The laws of most States also provide for what the Americans call a 'limited divorce,' and the English a 'judicial separation,' equivalent to the old divorce *a mensa et thoro*. It leaves the marriage still valid, but relieves the parties from any obligation to live together; and in some States the Court in pronouncing a decree of divorce may change the name of the wife (in Texas and Arizona the name of either party), while in Vermont it may also change the names of the children who are minors.

Not less remarkable than the multiplication of grounds for divorce in the American States is the extreme laxity of procedure which has grown up. The Courts having jurisdiction are usually the Courts of the county, tribunals of no great weight, whose ill-paid judges are seldom men of professional eminence. The terms of residence within a State which are required before a petitioner can apply for a divorce are generally very short. The provisions for serving notice on the respondent or defendant to the divorce suit are loose and seem to be carelessly enforced. Some States allow service to be effected by publication in the newspapers, if the other party be not found within the State, and this of course often happens when the applicant has recently come to the State, most likely a distant one, from that in which he or she lived with the other consort. Fre-

quently he comes for the express purpose of getting his marriage dissolved. Although most States declare collusion or connivance by the other party to be a bar to the granting of a divorce, and some few States provide that a public official shall appear to defend in undefended petitions, the provisions made for detecting these devices are inadequate; and in not a few cases the proceedings do little more than set a judicial seal upon that voluntary dissolution by the agreement of the two consorts, which was so common at Rome. It is doubtless a point of difference between the Roman law and that of modern American States that in the former the parties could by their own will and act terminate the marriage: in the latter the Courts must be invoked to do so. But where the Courts out of good-nature or carelessness made a practice of complying with the application of one party, unresisted or feebly resisted by the other, this difference almost disappears. The facilities which some of the more lax States hold out to those who come to live in them for the requisite period, and who then procure from the complaisant Court a divorce without the knowledge of the other consort, constitute a grave blot on the administration of justice in the Union generally, for a marriage dissolved in one State (where jurisdiction over the parties has been duly created) is *prima facie* dissolved everywhere[1]; and although the decree might conceivably be reversed if evidence could be given that it had been improperly obtained, it is usually so difficult to obtain that evidence that the injured party, especially an injured wife, must perforce submit.

[1] In two or three States the law provides that when an inhabitant goes into some other State for the purpose of getting a divorce for a cause arising within the State, or for a cause which the law of the State would not authorize, a divorce granted to him shall have no effect within the State.

XVIII. Statistics of Divorce in America.

Under these lax laws, and the not less lax administration of them, the number of divorces has in the United States risen with formidable rapidity. In 1867 there were 9,937 granted, in 1886, 25,535, an increase of nearly 157 per cent. in twenty years. The total number recorded to have been granted in those twenty years (and the record is probably not quite complete) is 328,716, a ghastly total, exceeding all the divorces granted in the same years in all other Christian countries[1]. The population of the Republic increased about 60 per cent. within the same twenty years. Taking the two census years 1870 and 1880, the percentage of increase was, for the population, 30.1, for divorce, 79.4, or more than twice as great; and while in many States the percentage of divorce increase is far larger than 79.4, there are only five in which divorce has not grown faster than population.

The increase is most rapid in the south-western States, in several New England States, and especially in the States of the far West, less marked in the north Atlantic States generally, and in those between the Atlantic and the Mississippi. It is greater in cities than in rural districts[2].

It is, in the South, apparently somewhat greater among the coloured people than among the whites[3]. It is greater among native-born Americans than among immigrants from Europe. And it need hardly be said

[1] In Canada during the same twenty years only 135 divorces were granted in a population which was, in 1881, 4,324,000. In some provinces of the Dominion divorces could be obtained only by private Act of Parliament.

[2] In an interesting article in the *Political Science Quarterly* for March, 1893, Mr. W. F. Willcox (now (1900) of the U. S. Census Office) argues that the divorce rate is influenced by depression of trade, declining when the lower middle and working class, among whom it is frequent, are less able to afford it.

Mr. Willcox quotes some remarkable figures from Japan showing an extremely high divorce rate there. In 1886 there were in Japan 315,311 marriages and 117,964 divorces. This is four and a-half times the rate in the U. S. of America, which comes next.

[3] The conditions prevailing among a coloured population which had, under slavery, no legal marriage, go far to explain this phenomenon.

that it is far larger among Protestants than among Roman Catholics. These points deserve to be remembered, because they throw some light on the causes which have produced the increase.

Some other facts to be noted before we pass on to consider those causes are the following.

The grounds on which divorces have been granted are often trivial, even frivolous. I select a few from a long list given in the American Official Report dealing with the subject [1].

A wife alleges that her husband has accused her sister of stealing, thereby sorely wounding her feelings.

Another says, 'During our whole married life my husband has never offered to take me out riding (= driving). This has been a source of great mental suffering and injury.'

Another complains that her husband does not wash himself, 'thereby inflicting on plaintiff great mental anguish.'

Another says that her husband 'quotes verses from the New Testament about wives obeying their husbands. He has even threatened to mash the plaintiff, and has drawn back his hand to do it.' The decree which awarded a divorce to this wife contains the following: 'I find that when plaintiff was sick and unable to work defendant told her the Lord commanded her to work, and that he was in the habit of frequently quoting Scriptural passages in order to show her she was to be obedient to her husband.'

A wife alleges that her husband does not come home till ten o'clock at night, and when he does return he keeps plaintiff awake talking. He also keeps a saloon, which sorely grieves mind of plaintiff. He replies, say-

[1] This Report, published in 1889 by the United States Labour Bureau at Washington, contains many instructive data. The Annual Reports of the voluntary Association, called the League for the Protection of the Family, also deserve to be consulted. Its corresponding secretary is the Rev. Dr. S. W. Dike of Auburndale, Mass., who has written a number of thoughtful articles upon the subject, and to whom I am much indebted for documents supplied to me and for the expression of his own views.

ing, 'Plaintiff should not be ashamed of him because temporarily in the liquor business: that he may do better some day: his father was a high State Officer in Germany.' This wife gets a divorce on the ground of 'mental cruelty.'

In all these cases, and in many others enumerated in the Report where the grounds are equally slight, the divorce is granted. And similar cases are given in which the husband obtains divorce on the ground of the wife's cruelty.

'Mental cruelty' is of course a term hard to define, as may be seen by examining the views that have been expressed by English judges on cruelty, and it is not wonderful that the easy-going courts of most American States should give a wide extension to such an elastic conception.

Of the causes recorded as those for which marriages are dissolved, the most frequent are Desertion, which represents 38.5 of the whole number of divorces; then Infidelity; then Cruelty; then Intoxication. Of the total number of divorces granted during the twenty years 1867-1886, 65.8 per cent., very nearly two-thirds, were granted to wives and 34.2 per cent. to husbands. Of the total number granted for infidelity 56.4 per cent. were granted to husbands and 43.6 to wives. But in the other chief causes wives are more frequently the successful applicants. In cruelty they obtain seven times as many decrees; in desertion one and a-half times as many; in intoxication eight times as many. The Report, however, shows that intemperance is either directly or indirectly responsible for a larger proportion of the total cases than its place in the table represents.

I take from a valuable paper by an Ohio lawyer (Mr. Newton D. Baker)[1] some facts which illustrate the state of things in one of the so-called 'Western Reserve' counties in that great State. In Cuyahoga county the total yearly number of marriages is about 3,400, and the

[1] *Western Reserve Law Journal* for October, 1899.

number of divorce suits annually brought is about 500. In the year 1898-1899, the whole number of divorce suits brought in the Court of Common Pleas was 562 out of a total number of 3,848 suits for all causes, *i.e.* about 12 per cent. In the State of Ohio the annual number of marriages is from 33,000 to 40,000; the total number of divorce suits brought from 3,700 to 4,200; and the total number of divorces granted annually about 3,000 in a population of about 4,000,000. Mr. Baker observes that 'five of the causes on which the law allows divorce, viz. wilful absence of either party from the other for three years, extreme cruelty, fraudulent contract, any gross neglect of duty, and habitual drunkenness for three years, are all so vague and elastic as to amount to unrestricted license in the matter of divorce.' Out of 366 divorces granted in the year 1898-1899, wilful absence and gross neglect of duty accounted for 150, extreme cruelty for 109, habitual drunkenness for 88, and infidelity for 14 only (five being unaccounted for). He adds, 'The personal temper and disposition of individual judges (there are more than eighty in the State entrusted with power to dissolve marriages) have come to be so well recognized as the limits of the jurisdiction of the Common Pleas Court in granting divorces, that now it is the practice of many lawyers to continue and delay the hearing of divorce causes until some judge, known to be lenient in this matter, rotates to the bench of the Court in which such cases are set for hearing. . . . Many of the judges appear to be oblivious to the fact that one of the most important interests of society is at stake in every divorce proceeding, and either out of unscientific ideas upon the subject, or out of mere complaisancy towards attorneys and litigants, they have lent themselves to a looseness of practice which is in some degree responsible for the deplorable results.'

In the United States applications for divorce are mostly made after a marriage of short duration. In

one-half of the cases divorce was granted within six years from the date of marriage. Oddly enough, the average duration of a marriage terminated by divorce varies much between State and State. It is shortest in the southern States, falling to 6.48 years in Arkansas, and 6.91 in Tennessee, highest in the north-east, rising to 11.69 in New Jersey, and 12.12 in Massachusetts. This may be partly due to the fact that the more conservative States require a longer period of desertion to be proved. The duration of marriage is somewhat longer in cases where the wife applies, which may indicate either that she is more patient under her lot than the husband, or that her comparative ignorance of the world makes her less able to resort to the Courts. The fact that desertion is the cause most frequently assigned by wives may also have its effect.

It would be important to know what proportion the desire to marry some one else bears to the other causes which induce persons to seek to escape from their existing wedlock. Unfortunately American statistics of marriage, which are in many States loosely kept, do not enable us to answer this question[1]. Practising lawyers say that nothing is commoner. It would appear, however, from some European[2] figures that there is in reality no greater tendency for divorced men, and scarcely any greater tendency for divorced women, to remarry within a few years of the dissolution of their marriage than there is for widowers and widows to do so after the death of a consort; and it has often been

[1] The Report for 1891 of the League for the Protection of the Family says: 'Connecticut for two years reports the number of divorced persons married each year. In 1889 there were 286 such—135 men and 151 women, which is a little above one-third the number divorced in the year. In 1890 there were 477 divorces granted, or 954 individuals divorced; and there were 350 divorced persons—this year 207 women and 143 men—who married again during the year. An extended induction along this line should be possible. Guesses based on mere observation are untrustworthy guides in legislation or social reform.'

[2] This point has been worked out by M Bertillon, a well-known French statistician. I owe my knowledge of it to an acute and suggestive paper (some of whose conclusions however seem to me questionable) by Mr. W. F. Willcox, of Cornell University, New York. 'The Divorce Problem': New York, 1891.

observed that persons who have been most happily married are among those most likely to marry again.

The rapid growth of divorce under the hasty legislation which marked the first half of the present century began about thirty years ago to create some alarm in the United States. The subject was much discussed, an association was formed to grapple with the evil, and in several States laws were passed restricting a little the causes entitling persons to be divorced[1]. In those States there has accordingly been some slight diminution in the number of divorces granted, but elsewhere the rate has gone on increasing, though apparently (for there are no very recent statistics) a little more slowly than it was doing down to 1886. In some States it seems, after increasing, to have now reached a stable average to the population. This would appear to be the case in Switzerland also.

XIX. Divorce in Modern European Countries.

It is not only in America that the evil grows. In all modern countries where divorce is permitted, that is to say in all Protestant and some Roman Catholic States, the same tendency is perceptible. Among the Protestant nations the impulse of the Reformation caused sooner or later a rejection of the old canonical doctrine of indissolubility; so we may say, speaking broadly, that in Germany, Switzerland, Holland, Denmark, Sweden and Norway, a marriage may be dissolved not only for the infidelity of either party (since in all these countries husband and wife are treated alike), but also for desertion and imprisonment for crime. Some laws go even further, allowing mutual consent to be a cause. Among Roman Catholic countries, France retained the canonical rule till the Revolution. The legislation of 1792

[1] Efforts have recently been made to induce States to adopt identical legislation on this among other topics · and there seems to be a prospect that a certain number will do so.

granted extreme freedom, which was so largely used that we are told that in 1797 there were more divorces than marriages. In 1816 the principles of Catholicism regained control, and held it till 1884, when a law was passed permitting marriages to be dissolved for the infidelity of either party, or for the condemnation of either to an infamous punishment, and authorizing the transmutation into an absolute divorce of a judicial separation which has lasted for three years. The law of Belgium is similar, but goes a little further in allowing mutual consent to be a ground, though one surrounded by many restrictions. Austria and Hungary allow divorce (under rules similar to those of Protestant countries, *i.e.* on the grounds of infidelity, grave crime, desertion, cruelty, &c.) to non-Catholic citizens, while Italy, Portugal, and Spain adhere to the Tridentine system which recognizes only a judicial separation (*a mensa et thoro*) and not a dissolution of the tie. Russia still leaves matrimonial causes to the ecclesiastical courts, but allows them to dissolve marriages on the ground of infidelity, a heavy criminal sentence, or disappearance of one consort for five years[1].

In nearly all these countries such statistics as are available show an increase in the number of divorces during recent years. For instance in Belgium, a predominantly Roman Catholic country, divorces rose between 1884 and 1893 from 221 to 497. In France the suits for divorce rose from 1773 in 1884 to 7445 in 1891. The number of divorces compared with the number of marriages almost doubled in those seven years. In the German Empire there were 5342 divorces granted in 1882 and 6178 in 1891. In Holland they were, in 1883, 189, in 1892, 354. A like period saw them rise in Sweden from 218 to 316, in Norway from 7 to 82 (!), in Greece from 251 to 788. The rise is slighter in Austria. Switzerland alone, though its law is comparatively lax, shows

[1] According to a high Russian authority, divorce was freely practised by the Russian peasantry under their ancient customs.

no increase[1]. In England divorces rose from 127 in 1860 to 390 in 1887, an increase much more rapid than that of population or of marriages[2]. Judicial separations rose between the same years from 11 to 50. In Scotland divorces which in 1867 numbered 32 had, in 1886, grown to 96, a still more rapid rise, as it covers only twenty instead of twenty-seven years. It is worth noting that in England it is usually the husband who petitions for a divorce, and almost always the wife who seeks a judicial separation.

The growth in so many otherwise dissimilar countries of this disposition to shake off the marriage tie is a remarkable phenomenon, which deserves more attention than it seems to have yet received in England. Though strongest in Protestant countries, it is not confined to them, as appears from the instances of Belgium, Bavaria and Greece. Though there is no divorce *a vinculo* in Italy or Spain, the same causes which make it frequent elsewhere may be at work, though less conspicuously, in countries where the State aids the Church in checking their outward manifestation. Divorce is an obtrusive symptom of the disease, not the disease itself.

What is the disease? or, lest we should seem to prejudge the merits of the matter, what is the source of this disposition to look upon the marriage tie with eyes different from those of a century ago, and to yield more easily to the temptation to dissolve it? The cause, whatever it is, must lie deep, for it manifests itself under many different conditions; and it may possibly be not any single cause, but a combination of several concurrent social or moral changes, independent springs whose confluence swells the stream of tendency.

A similar phenomenon happened once before in history. At Rome also, as we have already seen, a very strict theory of marriage and a corresponding strictness

[1] I take the above figures from *Parliamentary Paper* [C–7639] of 1895. No figures are given for Russia or Denmark.

[2] Parliamentary Return of March 9, 1889.

in practice gave way to great laxity of the law and, after a short interval, to unbounded licence in practice. Let us see whether we can, by examining the phenomena which brought about this change in the greatest of ancient States, hit upon any clue that may serve to explain the facts of our own time.

XX. Comparison of the Process of Change at Rome and in the Modern World.

The Romans began with a doctrine of marriage which had four salient characteristics[1]:

A formal legal act almost invariably accompanying marriage.

A religious element in the oldest form of this act.

A subjection of the wife to the husband's power.

A complete absorption of the wife's property rights into the legal personality of the husband.

These characteristics all vanished; and under the newer law and custom of the city, and ultimately of the Empire—

The act of marriage required no formalities, and was entirely a private affair.

It was also a purely civil, not a religious, affair.

The wife became absolutely independent of her husband, remaining (unless she had been emancipated) in the legal family of her father.

The wife's property remained her own, though it was usual for the consorts to have some joint property.

Concurrently with and following on these changes there had come about in Rome a general decline of faith in the old deities, a faith partially, but not beneficially, replaced by Oriental superstitions. There had also come habits of luxury, a thirst for material enjoy-

[1] See above, p. 788 sqq. Although no formal legal act and no religious rites were absolutely required for marriage at the time when we first discover the Roman Law as a working system, the practice of using either such an act or such rites was all but universal.

ment, a passion for amusements, a general relaxation of the moral restraints which public opinion had formerly imposed. Marriage had begun to be regarded mainly from the point of view of pecuniary interest or social advancement. There was comparatively little sentiment attaching to it, and not much sense of duty. Men grew less and less willing to marry; women as well as men less and less faithful. Fewer children were born. As neither religious nor moral associations sanctified the relation, and as it could be terminated at pleasure, it was lightly entered on, and this very heedlessness, making it frequently a failure, caused it to be no less lightly dissolved. Thus social habits and a standard of opinion were formed, against which the reforming efforts of Augustus and his successors could do little, and which resisted even the far more powerful efforts of Christianity, until Roman society itself went to pieces in the West, and passed into new forms in the East.

This decadence of the matrimonial relation was doubtless facilitated by three peculiarities of the law, viz. the absence of all prescribed forms for marriage and divorce, which set caprice free from legal restraints or delays, the extinction of any necessary connexion as regards property between the two spouses[1], and the fact that the legal family did not coincide with the natural family, for legally the wife remained in her father's family and did not enter her husband's. Nevertheless the underlying causes of that decadence were social and moral rather than legal causes.

In the modern world the change from the old state of things to the new has been slower and less complete. Still it offers a kind of parallel to the phenomena we have been considering.

Before the Reformation what were the features of the marriage relation in Europe?

It had a strongly religious character. Its formation

[1] The *Dos* supplied a connexion, but the wife's right to claim it at the end of the marriage was not greatly affected by her conduct (see pp. 795 and 803 *supra*).

was blessed by the Church. It was deemed a Sacrament. It was treated, for doctrinal reasons, as indissoluble. There were, to be sure, plenty of marriages essentially unhallowed, plenty of marriages contracted for the most sordid reasons, plenty of marriages with little affection; and there were also marriages tainted by sin. The standard of conjugal fidelity was in the fifteenth century a low one. Nevertheless the tie was deemed to be one which religion sanctified, and religious sentiment must have had a restraining effect upon tender consciences, and particularly upon the wife, women being usually more susceptible to religious emotion than men are.

It gave the husband, in most countries, and notably in England, an almost complete control over the property rights of the two spouses, and in this way held them together.

It gave the husband, and notably in England, almost complete control over the person and conduct of the wife, impressing upon her mind her dependence on him, and her duty to obey him. No doubt where the wife's intellect or will was the stronger of the two her intellect guided or her will prevailed. Nevertheless her normal attitude was that of a submissive identification of her wishes and interests with his.

Whether these things made for affection, and for happiness, the outcome of affection, is another question. What we have to remark is that at any rate they drew the bond very tight, and formed a solid basis for family life. Bride and bridegroom took one another for richer for poorer, for better for worse, in sickness and in health, till death should them part.

What has been the course of things since the Reformation?

In Protestant countries the religious character of marriage has been sensibly weakened. Although the ceremony, in most of such countries, and notably in England, still usually receives ecclesiastical benediction, the

tie is not to men's or even to women's minds primarily a religious tie. To most Protestants, the wedding service in church, or before a minister of religion, is rather an ornamental ceremony than essentially a sacred vow. The duties of the spouses are conceived of by them in a more or less worthy way, according to their respective religious and moral standards, but not generally, or at least seldom vividly, as a part of their duties towards God.

This is perhaps part of that general decline in the intensity of the feeling of sin which marks the Protestantism of our own time as compared with that of earlier centuries. I do not mean that people are any more sinful than they were—probably they are not. They were sinful enough in the seventeenth century. But wrong-doing presents itself more frequently to all but the most pious minds rather as something unworthy, something below their standard of honour, something disapproved by public opinion, than as something which deserves the wrath of God, and affects their true relation to Him as their Father. Thus the element of sin in any breach, be it slight or be it grave, of conjugal duty, would seem to be less present to the conscience of the average husband or wife now than it was formerly, at least if we are to take the literature (including the theological literature) of former times, when set beside that of our own, to be any guide.

The inquiry how far any similar change has passed upon sentiment in Roman Catholic peoples would lead us far, nor am I competent to pursue it. The conception of sin itself is not quite the same thing to pious Catholics as it is, or was, to pious Protestants. But, broadly speaking, marriage doubtless retains to Roman Catholics, and to the Orthodox church of the East, more of a sacred character than it does to Protestants, and the change in this respect from the sixteenth to the nineteenth century is doubtless greater among Protestants.

XXI. Tendencies affecting the Permanence of the Marriage Tie.

In most countries, and notably in England and the United States, married women have obtained power over their own property, including their earnings, and are now less dependent upon their husbands for support than they were formerly.

In most countries married women have far greater personal independence than in earlier days. They can dispose of their lives as they please, and are permitted both by law and by usage an always increasing freedom of going where and doing what they will. For social purposes, they are in England (at least those who belong to the upper and middle classes are), and still more in the United States, though somewhat less in such countries as Germany and Sweden, entirely the equals of men, so that the retention of the promise to obey in the marriage service of the English Church excites amusement by its discrepancy from the facts.

Over and above these changes directly affecting the matrimonial relation, there are other changes which have modified life and thought. The old deference to custom and tradition, and therewith the stability of the social structure as a whole, have been weakened. Men move much more from place to place, so their minds have grown less settled. The habit of reading, and in particular the excessive reading of newspapers, may have produced a quickness of apprehension, but it has been accompanied by a measure of volatility and inconstancy in opinion. These in their turn have bred a liking for novelty and excitement, and have confirmed the disposition to question old-established doctrines. There is an increase, especially among women, of the things called ' self-consciousness ' and ' nervous tension.' Both men and women are more excitable, and women in particular are more fastidious. Pleasures other than material are probably more appreciated, but the desire for

pleasure, and the belief that every one has a right to it, seem to be stronger and more widely diffused than ever before. Some will perhaps add that, in an age when the belief in a future state of rewards and punishments is less deep and less general than it once was, the desire to have out of this life all the pleasure it can be made to yield is naturally stronger; yet I doubt whether beliefs regarding a future life have ever influenced men's conduct so much as the whilom universality of those beliefs might lead us to assume.

All these tendencies are partly due to, and are certainly much increased by, that aggregation of population into great cities which makes one of the most striking contrasts between our time and the ages which formed English and American character. It is in industrial and progressive communities, such as those of Germany, Belgium, France, and England, that these tendencies are most pervasive and effective. They are even more pervasive and multiform in the United States than in Europe. It would be strange indeed if they did not affect the theory and the practice of domestic relations and the conception of the family. And their influence will evidently be greatest in the country where the ideas of democratic equality, and the notion that every human being may claim certain indefeasible 'human rights,' have struck deepest root.

The idea that men and women are entitled to happiness, and therefore to have barriers to their happiness removed, is strong in the United States, and has gone far to prompt both the indulgence of the laws and the over-indulgence shown in administering them. This idea has its good side. The fuller recognition of the right of women to develop their individuality and be more than mere appendages to men is one of the conspicuous gains which the last two or three generations have brought. It has helped to raise the conception of what marriage should be, so we must expect to find that it has made women less tolerant of an unsym-

pathetic or unworthy partner than they were in the eighteenth century.

It would not therefore be wonderful if, even apart from such facilities as legislation has allowed, and assuming that there was one and the same divorce law over all civilized countries, the United States should show, as Switzerland shows in Europe, an exceptionally high percentage of divorces to marriages. Newspapers are more read there than in any other country; and newspapers contain a great deal about matrimonial troubles which would be better left unpublished. The life of the middle class is more full of stir and change and excitement than it is in Europe. Both the process described as the emancipation of women, and the admission of women to various professions and employments formerly confined to men, have gone further there than in Europe. So has the carrying on of industries in factories instead of at home. So has the habit of living in hotels or boarding-houses.

All these conditions are less favourable than were the conditions of a century ago to the maintenance of domestic life on the old lines. And over and above these, there has come that extreme laxity of the law and of judicial procedure which has been already described. Thus we can easily account for the comparative frequency of divorce in the United States, while yet noting, for this is the point of real importance, that the phenomena of the United States are not isolated, but merely the most conspicuous instance of a tendency which is at work everywhere, and which springs from some widely diffused features of modern life.

The points of similarity between the history of divorce at Rome and its history in recent times need not be further insisted on. There is, however, one to which I have not yet adverted. At Rome the increase of conjugal infidelity and that of divorce would seem, from such data as law and literature give us, to have gone on

together, each fostering the other. Is there any like connexion discoverable now?

This is a question which it appears impossible to answer either generally or for any particular country. There are no statistics available, except for matrimonial causes coming into the Courts, and we can never tell what proportion the offences that are disclosed bear to those which remain hidden. There have been countries where the level of sexual morality was extremely low, at least among the wealthier classes, though no divorce was permitted. There may be countries where the very fact that the level is low keeps down the number of applications to the Court, because the injured party acquiesces and takes his or her revenge in like offences. Common talk, and literature which as regards the past may sometimes represent nothing more than common talk[1], are unsafe guides, as any one will see who asks himself how much he knows about the moral state of his own country in his own time. He can form some sort of guess about the character of the 'social set' he moves in, but how little after all does he know about the classes above or below his own! Thus there can be very few persons in England whose means of information entitle them to say that the undoubted increase of divorce cases in our Courts since 1860 represents any decline in the average conjugal morality of the people. As regards the United States, I have heard the most opposite views expressed with equal confidence by persons who ought to have been equally well-informed. Judicial statistics do not prove that infidelity has become more common there, for the largest proportion of divorces granted is for desertion, 38.5 per cent. of the whole, those for infidelity being little more than half of that percentage, or about one-fifth of the whole.

[1] Sometimes not even that. A few years ago, in the United States Senate, some one quoted, in order to prove the corruption of public life in England, a play represented there, in which a Secretary of State or his wife was involved in a disgraceful job connected with an Indian railway. Nobody in England had taken such a thing seriously enough to comment on the absurdity of it.

At the same time the smallness of this percentage may count for less than might appear, for it is probable that in States where divorce can be obtained for other grounds, less serious and easier to prove than infidelity is, petitioners will, where they have a choice of several charges to make, put forward a less grave charge provided it is sufficient to secure their object. So far as my own information goes, the practical level of sexual morality is at least as high in the United States as in any part of northern or western Europe (except possibly among the Roman Catholic peasantry of Ireland), and experienced judges in America have told me that, odious as they find the divorce work of their courts, the thing which strikes them in the cases they deal with is more frequently the caprice and fickleness, the irritability and querulous discontent of couples who have married on some passing fancy, than a proclivity to breaches of wedded troth.

Indeed, so far from holding that marriages are more frequently unhappy in the United States than in western Europe, most persons who know both countries hold the opposite to be the case. On the whole, therefore, there seems no ground for concluding that the increase of divorce in America necessarily points to a decline in the standard of domestic morality, except perhaps in a small section of the wealthy class, though it must be admitted that if this increase should continue, it may tend to induce such a decline.

The same conclusion may well be true regarding the greater frequency of divorce all over the world. There is no reason to think that sexual passion leading to conjugal infidelity is any commoner than formerly among mankind. More probably passion is tending to grow rather weaker than it was formerly. But that which we call Individualism, viz. the desire of each person to do what he or she pleases, to gratify his or her tastes, likings, caprices, to lead a life which shall be uncontrolled by another's will—this grows stronger. So, too, what-

ever stimulates the susceptibility and sensitiveness of the nervous system tends to make tempers more irritable, and to produce causes of friction between those who are in constant contact. Here is a source of trouble that is likely to grow with the growing strain of life, and with the larger proportion which other interests bear in modern life to those home interests which formerly absorbed nearly the whole of a woman's thoughts. It is temper rather than unlawful passion that may prove in future the most dangerous enemy to the stability of the marriage relation.

XXII. Influence of the Church and the Law.

The view of marriage as a tie which the parties intend to enter into for their lives, and which the law holds indissoluble, has hitherto rested not so much on any abstract theory or sentiment which men and women have entertained regarding it as upon the three authorities which have formed both sentiment and opinion. These three are the Church, the State, and Tradition, that is to say the beliefs which people adopt because they have come down from the past. The attitude of the Church has in Protestant nations sensibly altered. In some countries it altered in the sixteenth century. It has everywhere altered in the nineteenth. So, too, the support given to the old view by the State has in like manner become in those same countries much weaker, and in some countries, as for example in Switzerland and many American States, has almost disappeared. Public opinion has itself been largely formed by the Church and the Law, and may, when they have ceased to form it, be no longer an effective guardian of the permanence and dignity of marriage. In such democracies as those of the United States, the wish of an active minority to procure changes in the law easily prevails, because no one cares to resist, and because abstract principles suggest that the more everybody is

permitted to do as he pleases, the happier everybody will be. When the law has been changed, public opinion, that is to say the opinion of the majority who do not think seriously about the matter, soon adjusts itself to the new law, and little social blame attaches to those who use the licence which the law has granted. Seeing then how largely the law, whether of the Church or of the State, moulds the sentiment of the people on such a subject as this, and seeing that the Church no longer makes or administers law in Protestant countries, one may say that the civil law is practically left to keep their conscience. This tendency of the Church to abnegate its old functions makes the question of the way in which the Law should deal with divorce a question of critical importance [1].

As regards America, the opinion of the wisest and best informed people, though far from unanimous in points of detail, agrees in thinking that many States have gone too far in the way of laxity.

XXIII. Does the English Law of Divorce need Amendment?

In England the topic has been less discussed; yet there are some who hold that women ought to be placed on the same footing as men, and allowed to obtain a divorce from an unfaithful husband, even if he has not been guilty of cruelty. Others would go even further and admit other grounds as entitling either party to a dissolution of the marriage. The late Lord Hannen, whose opinion was entitled to exceptional weight, for he had presided over the English Divorce Court for many years with singular ability and fairness, told me that he thought the English law might with advantage be somewhat relaxed, so numerous were the cases in

[1] Some of the Churches in the United States have however tried to deal with the matter. The Protestant Episcopal Church is at this moment (1901) considering a draft canon.

which it was obviously best that a miserable marriage should be extinguished altogether. Yet the example of the United States (not to speak of Rome) suggests the danger of any but a very slow and cautious advance in that direction. Great as is the hardship of chaining an innocent to a vicious or drunken or brutal consort, the evil of permitting people to get rid of one another merely because they are tired of one another is no less evident. When the question is asked, 'What is the best divorce law?' the only answer can be, 'There is no good divorce law.' There are some faults in human nature which always have existed and apparently always will exist; and there is no satisfactory method of dealing with them. All that can be done is to choose between different evils.

Upon the whole, after weighing the considerations on both sides, the balance seems to incline to a change in the law which should not only equalize the position of the wife and the husband, by giving the former the same right to dissolution as the latter, but should also allow dissolution in cases of hopeless lunacy and of long-continued desertion.

Throughout this discussion it has been assumed that marriages ought to be permanent, and that obstacles should be thrown in the way of those who seek to dissolve them. It may be asked whether this assumption is justified. There is a school of thought, small perhaps, but of long standing and supported by a few eminent names, which insists that marriage should last no longer than love does; and therefore that the pair should, as in Rome, be permitted to separate with freedom of re-marriage, whenever they are no longer held together by inclination. There is also a larger school, which feels so keenly the misery caused by ill-assorted unions as to think that the parties should be allowed to dissolve them, when certain terms for reflection and repentance prescribed by law have been completed.

I do not propose to argue afresh this question, for

it has been often and copiously argued. Yet it is not a question to be dismissed without argument, for in our day no moral or religious dogma, however long established or widely held, is permitted to rest upon authority alone. But to argue it fully would draw us far from the historical inquiry we have been engaged on. It is enough to indicate in a word or two the main grounds which have in fact led the vast majority of thoughtful men to the assumption aforesaid. The first of these is the interest of children. Few things can be more harmful to the moral well-being of the offspring of a marriage than the divorce of their parents, which destroys one or other of the two best influences that work on childhood and may poison even the influence that is left. The next is the fact that, though it is professedly in the interest of suffering wives that facility of divorce is usually advocated, such facility tends to the injury of wives even more than of husbands, because men are, it would seem, more fickle and more prone to seek the dissolution of marriage when they are tired of their partner, or have formed some illicit connexion, or seek to marry some other woman. The third is that whatever weakens the conception of the marriage tie as a permanent one strikes at the whole character and essence of the marriage relation. It is often said that when people know they have got to live together, they are forced to exercise the self-control necessary to enable them to live together. But the moral effect of the sense of permanence in wedded union goes deeper than this. It is in the complete identification of the two beings and the two lives that the true happiness of a happy marriage lies. The sense that each has absolutely committed himself or herself to the other—each taking charge of the joys and sorrows and hopes of the other, each trusting to the other his or her joys and sorrows and hopes—gives to the relation an incomparable sanctity, and makes the strongest possible appeal to the best feelings of each. If selfishness and falsehood

can be overcome by anything, it is by calling into action the sense of obligation to fulfil this trust which the enduring nature of the union is calculated to inspire. Were the union to cease to be thought of as enduring, were it to be in the minds of the parties, as their minds are moulded by the practice and the prevailing notions of society, merely the result and expression of a possibly transient passion, or of the willingness to try the experiment of a joint household, the sanctity and the sense of obligation would receive an irreparable blow.

Thus we are driven to the conclusion that numerous as the cases may be in which, if one looked only at the wretchedness of the parties to an ill-assorted union, one might desire to see that union dissolved, more harm than good may on the whole result from permitting the parties to dissolve their union at their pleasure, as the later Romans did, as the French did during the Revolution, and as some American States practically do to-day; and more harm than good may result even from extending in large measure the opportunities for divorce which the law of England or that of Scotland at this moment affords.

How vital to the future of humanity are the interests involved is admitted on all hands by those who would change, as well as by those who would uphold, the conception of marriage as a permanent relation. Great as is the contrast between that sensual and unworthy view which finds its expression in the polygamy of the East and the view which Christianity has formed among Western peoples, it is hardly greater than that which exists between the view of marriage as a life-union, dissoluble only when infidelity has shattered its basis, and the view which puts it at the mercy of the caprice of a volatile nature or the temper of an irritable one. Polygamy has been and remains a blighting influence on Musulman society, and on the character of individual Musulmans. So if marriage were to become a transitory relation, as it practically was among the upper classes in

the Roman Empire, the effects upon family life and on the character of men and women would in the long run be momentous.

XXIV. Some General Reflections: Changes in Theory and in Sentiment regarding Marriage.

A few words more to sum up the general result of our survey. We have seen that the relations of the wife to the husband have been regulated sometimes by one, sometimes by the other of two systems, which have been called those of Subordination and Equality[1]. In all countries custom and law begin with the system of Subordination. In some, the wife is little better than a slave. Even at Rome, though she was not only free but respected, her legal capacity was merged in her husband's.

This system vanishes from Rome during the last two centuries of the Republic, and when the law of Rome comes to prevail over the whole civilized world, the system of Equality (except so far as varied by local custom) prevails over that world till the Empire itself perishes.

In the Dark Ages the principle of the subordination of the wife is again the rule everywhere, though the forms it takes vary, and it is more complete in some countries than in others. It was the rule among the Celtic and Teutonic peoples before they were Christianized. It finds its way, through customs conformable to the rudeness of the times, into the law of those countries which, like Italy, Spain, and France, were only partially Teutonized, and retained forms of Latin speech. It holds its ground in England till our own time, though

[1] By Equality I do not mean any recognition of Identity or even Similarity as respects capacity and practical work (though the tendency is in that direction), but the equal possession of private civil rights and the admission of an individuality entitled to equal respect and an equally free play of action. Such Equality is perfectly compatible, given sufficient affection, with a complete identification of the consorts in the harmony which comes of the union of diverse but complementary elements.

latterly much modified by the process which we call the emancipation of women, a process which, under the influence of democratic ideas, has moved most swiftly and has gone furthest among the English race in North America. But in our own time the principle of equality has, in most civilized countries, triumphed all along the line, and so far as we can foresee, has definitely triumphed. One must imagine a complete revolution in ideas and in social habits in order to imagine a return to the system of Subordination as it stood two centuries ago.

As there have been two systems determining the relations of husband and wife in respect of property and of personal control, so also have there been throughout all history two aspects of the institution of marriage, one in which the sensual and material element has predominated, the other in which the spiritual and religious element has come in to give a higher and refining character to the relation. In this case, however, it is not possible to make the relative importance of these two aspects synchronize with the general progress of civilization, nor even with the elevation of the position of women. It is true that among barbarous and some semi-civilized races the physical side of the institution is almost solely regarded, and that we may suppose a remote age when primitive man was in this respect not much above the level of other animals. But there have been epochs when civilization was advancing while the moral conception of marriage, or at any rate the popular view of marriage as a social relation, was declining. The tie between husband and wife in the earlier days of Rome was not only closer but more worthy and wholesome in its influence on the lives of both than it had become in the age of Augustus. Christianity not only restored to the tie its religious colour, but in dignifying the individual soul by proclaiming its immortality and its possibility of union with God through Christ gave a new and higher significance to life as a whole, and to

the duties which spring from marriage. The greatest advance which the Christian world made upon the pagan world was in the view of personal purity for both sexes which the New Testament inculcated, a view absent from the Greek and Italian religions and from Greek and Latin literature, though there had been germs of it in the East, where habits of sensual indulgence more degrading than those of the West were opposed by theories of asceticism, which passed into and tinged primitive and mediaeval Christianity.

The more ennobling view of love and of the marriage relation held its ground through the Middle Ages. There was plenty of profligacy—as indeed the ideal and the actual have never been more disjoined than in the Middle Ages. But in spite of profligacy on the one hand, and the glorification of celibacy on the other, and notwithstanding the subjection of women in the matter of property and even of personal freedom, the conception of wedded life as recognized by the law of the Church and enshrined in poetry remained pure and lofty. That the Reformation took away part of the religious halo which had surrounded matrimony may be admitted. Whether this involved a practical loss is a difficult question. It may be that, in their anxiety to be rid of what they deemed superstition, and in their disgust at the tricky and mercenary way in which ecclesiastical lawyers had played fast and loose with the intricate rules of canonical impediment, the Reformers of Germany, Scandinavia, and Scotland forgot to dwell sufficiently on the fact that though marriage is a civil relation in point of form and legal effect, it ought to be, to Christians, essentially also a religious relation, the true consecration of which lies not in the ceremonial blessing of the Church, but in the solemnity of the responsibilities it involves. Yet it is not clear that, in point of domestic happiness or domestic purity, the nations which have clung to the mediaeval doctrine stood a century ago, or stand now, above those which had renounced it.

General theories regarding the influence of particular forms of religion, like theories regarding the influence of race, are apt to be misleading, because many other conditions have to be regarded as well as those on which the theorist is inclined to dwell.

Whoever regards the doctrines of the Roman Catholic Church respecting marriage and realizes her power over her members will expect to find a higher level of sexual morality in Roman Catholic countries than he will in fact find. So on the other hand will he be disappointed who accepts that view of the superiority in social virtues of peoples of Teutonic stock which finds so much favour among those peoples, for dissolutions of the marriage tie have latterly grown more frequent than they formerly were among Protestant and Teutonic nations, and are apparently less condemned by public opinion than was the case in older days.

The material progress of the world, the mastery of man over nature through a knowledge of her laws, the diffusion of knowledge and of the opportunities for acquiring it, are themes which ceaselessly employ the tongues of speakers and the pens of journalists, while they swell with pride the heart of the ordinary citizen. But they are not the things upon which the moral advancement of mankind or the happiness of individuals chiefly turns. They co-exist, as the statistics of recent years show, with an increase over all, or nearly all, civilized countries of lunacy, of suicide, and of divorce.